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In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
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NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56028

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER,* IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-56387

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-55089

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES; TIM MILLER; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; JANE ALEXANDER, IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS-APPELLANTS

Argued and Submitted Feb. 3, 1994
Decided Nov. 5, 1996

Before: BROWNING, FERGUSON and KLEINFELD, Circuit Judges.

Opinion by Judge BROWNING; Dissent by Judge KLEINFELD.

JAMES R. BROWNING, Circuit Judge:

Plaintiffs Karen Finley, John Fleck, Holly Hughes, and Tim Miller were refused fellowships under the defendant National Endowment for the Arts' ("NEA") solo performance artists program. They filed suit, alleging, among other things, that a provision of the NEA's governing statute identifying the standard for approval of funding applications violated the Fifth and First Amendments because it was impermissibly vague and imposed content-based restrictions on protected speech. The district court agreed, granted summary judgment to the plaintiffs, and certified

its ruling for interlocutory appeal. *Finley v. National Endowment for the Arts*, 795 F.Supp. 1457 (C.D. Cal. 1992). We affirm, essentially for the reasons stated by the district court.[1]

Congress gave the NEA authority "to establish and carry out a program of . . . grants-in-aid . . . to . . . individuals of exceptional talent engaged in or concerned with the arts." 20 U.S.C. § 954(c). The Chairperson of the NEA has ultimate authority to approve or disapprove grants. 20 U.S.C. §§ 954(c), 955(f). Before making a decision on a particular grant application, however, the Chairperson must consult and receive the advice of the 26-member National Council on the Arts.[2] 20 U.S.C. § 955(f). The Chairperson may not approve any application disapproved by the National Council. *Id.* The Chairperson must

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[1] We do not address the district court's ruling in favor of plaintiffs on their claim that the Chairperson violated the NEA's governing statute by obtaining the advice of the National Council on the Arts through a telephone poll before acting on plaintiffs' applications. The parties have settled this issue.

We also do not reach plaintiffs' claim that the statute imposes an unconstitutional condition in violation of *F.C.C. v. League of Women Voters*, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984). The district court denied summary judgment on the ground that there were disputed issues of fact bearing on the claim, and this denial of summary judgment is not appealable. Because the issue is not properly before us, we do not address the dissent's suggestion that *League of Women Voters* is distinguishable.

[2] The Chairperson and Council members are appointed by the President, by and with the advice and consent of the Senate. 20 U.S.C. §§ 954(b)(1), 955(b).

also utilize advisory panels to review applications and make recommendations to the National Council. 20 U.S.C. § 959(c).

An advisory panel recommended approval of plaintiffs' applications; a majority of the Council recommended disapproval; the Chairperson denied the applications. The district court concluded the statutory standard under which the applications were judged, which requires the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. § 954(d)(1), violated plaintiffs' due process and free speech rights.[3]

I.

The void-for-vagueness doctrine incorporates several important due process principles.[4] It requires

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[3] 20 U.S.C. § 954(d), as amended in 1990, reads as follows:

> No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—
>
> (1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.* . . . (added language emphasized).

[4] Although the dissent argues the applicants have no property right in NEA grants and their liberty to express themselves is not regulated by the grants, the right to engage in free speech is a liberty interest protected by due process. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 418, 94 S.Ct. 1800, 1814, 40 L.Ed.2d 224 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983) ("Freedom of speech is one of the liberties the due process clause has been held to protect."). Art is one of many protected forms of speech. *See Miller v. California*, 413 U.S. 15, 34, 93 S.Ct. 2607, 2620, 37 L.Ed.2d 419 (1973). While the artists do not have a property right in the grants, they are protected by the due process clause from arbitrary and discriminatory enforcement of vague standards that "'abut[s] upon sensitive areas of basic First Amendment freedoms.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (citation omitted).

that a law give fair notice of its mandate. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972).

The First Amendment, moreover, is an independent source of vagueness doctrine. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1266 (3d Cir. 1992) (explaining that "courts have transplanted this due process principle into the First Amendment setting"). Thus, we routinely consider whether speech-related statutes are impermissibly vague without specifying the liberty or property interest at stake. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-14 (9th Cir.1988); *Planned Parenthood v. Arizona*, 718 F.2d 938, 946-49 (9th Cir.1983). In this case, we ground our discussion of vagueness in both the Fifth and First Amendments.

In addition, we disagree with the dissent's suggestion that First Amendment vagueness doctrine only applies if the government regulates speech or places conditions on a generally available benefit. As the Court noted in *Rosenberger*, the scarcity of a government benefit does not render it immune from constitutional limitations. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, — U.S. ——, —— - ——, 115 S.Ct. 2510, 2519-20, 132 L.Ed.2d 700 (1995).

The void-for-vagueness doctrine also requires that a law provide explicit standards for those who are to apply it. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09, 92 S.Ct. at 2299.

The twin dangers of a vague law—lack of notice and arbitrary or discriminatory application—may chill the exercise of important constitutional rights. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Id.* at 109, 92 S.Ct. at 2299 (citation omitted). Not surprisingly, therefore, courts apply a heightened vagueness standard to a law that could deter protected speech because of its uncertain meaning. *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").[5]

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[5] NEA contends that on review of a facial challenge, plaintiffs may prevail only if "there are no constitutional ways that the statute can be implemented." This standard applies only if the statute "implicates no constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *United States v. Wunsch (In re Swan)*, 84 F.3d 1110, 1119 (9th Cir.1996). When a law implicates free speech, a "more stringent vagueness test" should apply. *Hoffman*, 455 U.S. at 499, 102 S.Ct. at 1193; *see also Wunsch*, 84 F.3d at 1119.

A.

NEA's primary contention is that the vagueness of the "decency and respect" provision is not an issue. In its view, Congress did not compel NEA to add this element to the standard for judging grant applications, and the NEA elected not to add it. The standard therefore remains as it was before the amendment: the sole criteria for judging grant applications are "artistic excellence and artistic merit."

NEA reads the "decency and respect" amendment as requiring only that the Chairperson "*tak[e] into consideration* general standards of decency and respect for diverse beliefs and values" when promulgating regulations and procedures for judging grant applications. 20 U.S.C. § 954(d)(1) (emphasis added). According to NEA, the Chairperson *did* address Congress's concern that decency and respect for diverse beliefs and values be considered in funding decisions, and concluded no change in the regulations was necessary because the NEA's governing statute requires advisory panels with diversified membership to review applications and make recommendations to the National Council.[6] The Chairperson reasoned that because advisory panels were composed of members chosen to reflect a wide range of backgrounds and points of view, the decisions of these panels as to the artistic excellence and merit of individual applications would necessarily reflect general standards of

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[6] The statute requires the Chairperson to: "issue regulations and establish procedures . . . to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view. . . ." 20 U.S.C. § 959(c).

decency and show respect for the diverse beliefs and values of the American public.

This interpretation reads § 954(d) as if it had not been amended. Congress added the clause at issue—"taking into consideration general standards of decency and respect"—immediately after the clause specifying the criteria by which applications are to be judged—"artistic excellence and artistic merit." Read together, these clauses instruct the Chairperson to ensure that standards of decency and respect for diverse values are considered when judging the artistic merit and excellence of an application.

Congress spoke in mandatory terms when it amended the criteria for judging grant applications: "the Chairperson *shall ensure* that ... artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d) (emphasis added). This language does not grant the Chairperson broad discretion in establishing criteria for judging grant applications, as NEA contends; it actually restricts the Chairperson's discretion by requiring him or her to judge applications according to standards of "decency and respect."[7]

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[7] The dissent suggests this provision merely requires the NEA to think about standards of decency and respect rather than to act according to what thoughts of "decency and respect" might dictate. This suggestion is implausible on its face and belied by the record. During the period in which the plaintiffs' applications were being considered, Chairperson Frohnmayer told his staff that the NEA had to live in a "political world" and reject some grant applications to

NEA's reading of § 954(d)(1) is also contrary to traditional canons of statutory construction. If § 954(d)(1) required nothing more than diverse advisory panels, the "decency and respect" provision would be redundant in view of § 959(c), also adopted as part of the 1990 amendments, which expressly requires that advisory panels reflect diversity.[8] *See Freytag v. Commissioner*, 501 U.S. 868, 877, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (citation omitted).[9]

And turning to the legislative history, as we do to interpret an ambiguously worded statute, makes it clear that Congress intended to change the standard NEA applied in judging applications for funding, not simply to ask the NEA to consider the problem. NEA had been attacked for funding controversial artists and art works. Criticism had focused on a series of photographs by Robert Mapplethorpe objected to as homoerotic images, and on a photograph by Andres Serrano criticized as blasphemous. The "decency and respect" provision was enacted in direct response to this controversy and was specifically designed to prevent the funding of similar art works. Members of

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"reassure [the NEA's] constituency." (Supplemental Excerpts of Record 148).

[8] *See supra* note 6.

[9] NEA's argument that its interpretation of § 954(d)(1) does not render the "decency and respect" provision redundant because under NEA's interpretation the Chairman was not compelled to make any change in the standard at all, necessarily fails with our rejection of NEA's interpretation of § 954(d)(1).

Congress noted that the "decency and respect" provision would prevent the funding of similar works in the future.[10] 136 Cong. Rec. H9410-57 (Oct. 11, 1990).

In the words of Representative Henry, author of the provision: "[T]his substitute includes language in the heart of the grant making ... process. We add to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account on behalf o[f] the American public. . . ." 136 Cong. Rec. H9417 (Oct. 11. 1990). Representative Henry described the provision as "new language now in the grant procedure itself which mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong. Rec. H9457 (Oct. 11, 1990). In the same vein, Representative Coleman, co-sponsor of the bill, said: "[W]e have added language . . . which underscores that the decisions of artistic excellence must take into consideration general standards of decency and respect for the diverse beliefs and values of the American public. Works which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds." 136 Cong. Rec. H9410 (Oct. 11, 1990).

In concluding that Congress intended to include the criteria of "decency and respect" in the standard for judging grant applications, we reject NEA's contention that § 954(d)(1) is to be read as a compromise between legislators who wanted to impose explicit content restrictions upon funding and those who wanted to impose no "decency and respect" restric-

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[10] Mapplethorpe's and Serrano's works were also referred to during debates on NEA's budget. See, *e.g.*, 135 Cong. Rec. H3637, H3640 (July 12, 1989).

tion at all, and agreed simply to identify "decency and respect" as an area of concern but require no further action by NEA. No proposal submitted to Congress would have permitted funding with no content restriction at all. The dispute was not over whether NEA should be free to fund indecent or disrespectful art, but over the way in which the new limitation would be imposed: whether Congress should specify categories of art that could not be funded or instruct NEA to consider general standards of "decency and respect" in judging the artistic merit of a grant application. Congress settled on the latter approach.

We also reject NEA's argument that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), requires deference to NEA's construction of its statutory mandate. NEA's construction of the statute as permitting the Chairperson to rely upon greater diversity in advisory panel membership in lieu of a change in the criteria for judging grant applications is not a "permissible" or "reasonable" one to which deference is required. *Id.* at 843-45, 104 S.Ct. at 2782-83. Moreover, NEA itself did not in practice adopt the interpretation of the "decency and respect" provision it advocates in this litigation. In a meeting held on December 14 and 15, 1990, the Chairperson and National Council considered a number of proposals to implement the "decency and respect" provision. They did not question their obligation under § 954(d)(1) to judge grant applications according to "general standards of decency and respect for the diverse beliefs and values of the American public." Instead, to satisfy this new obligation, NEA officials adopted the approach of having the Chairperson instruct advisory panel members to bring their own

definitions of these terms "to the table" and make them "part of the deliberative process." Minutes of the December 1990 Retreat of the National Council on the Arts at 21, S.E.R. at 23.

B.

NEA contends that even if § 954(d)(1) requires it to judge grant applications according to general standards of decency and respect, the Chairperson could by regulation implement this standard in a way that would obviate the vagueness problem. However, the NEA has failed to present a narrowing construction that is consistent with the language and purpose of the statute, and "we will not rewrite a . . . law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n.*, 484 U.S. 383, 397, 108 S.Ct. 636, 645, 98 L.Ed.2d 782 (1988); *see also Heckler v. Mathews*, 465 U.S. 728, 741, 104 S.Ct. 1387, 1396, 79 L.Ed.2d 646 (1984) ("The canon favoring constructions of statutes to avoid constitutional questions does not . . . license a court to usurp the policymaking and legislative functions of duly elected representatives.").

NEA suggests the Chairperson could apply § 954(d)(1) by rejecting applications for funding of projects that are obscene under the standard announced in *Miller v. California*, 413 U.S. 15, 24-25, 93 S.Ct. 2607, 2614- 16, 37 L.Ed.2d 419 (1973)—a standard that passed the vagueness test in *Hamling v. United States*, 418 U.S. 87, 110-16, 94 S.Ct. 2887, 2904-07, 41 L.Ed.2d 590 (1974). However, the proposed construction would render redundant a separate prohibition against funding projects determined to be obscene, subsection (2)

of section 954(d).[11] *See Freytag*, 501 U.S. at 877, 111 S.Ct. at 2638. Congress adopted the "decency and respect" provision because it was broader and had a different meaning than the provision prohibiting the funding of obscene art.[12] Moreover, the NEA's proposed construction would be contrary to the express intent of Congress that determinations of obscenity be made by the courts and not by NEA.[13]

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[11] 20 U.S.C. § 954(d)(2) reads:

> Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.

NEA argues the suggested regulation would not render section 954(d)(2) redundant because the latter applies only to material "determined to be obscene" by a court. This argument does not affect the other reasons stated in the text for the invalidity of the hypothetical regulation.

[12] *See* 136 Cong. Rec. H9457 (Oct. 11, 1990) (Statement of Rep. Henry) ("[The decency and respect provision] is much broader than all the obscenity language which we have been debating about. . . . [G]iven the Miller versus California standard, anything that has artistic merit is not by legal definition obscene. So, how can we seek to address the problem that we heard from our constituents? We put general decency requirements into the act.").

[13] "The term 'determined to be obscene' means determined, in a final judgment of a court of record and of competent jurisdiction in the United States, to be obscene." 20 U.S.C. § 952(j). *See* 136 Cong. Rec. H9676 (Oct. 15, 1990) (statement of Rep. Weiss) ("Is not one of the problems also that whereas the Williams/Coleman [amendment] provides for the obscenity determination to be made by the courts, in the Regula amendment the determination would have to be made by NEA and

NEA also seems to suggest the Chairperson might avoid the vagueness problem by adopting the definition of "indecent communication" promulgated by the Federal Communication Commission and applying the standard only to works intended for children.[14] This construction is precluded by Congress's explicit refusal to include the FCC's definition of indecency in s 954(d)(1).[15] Congress considered the definition inappropriate for the arts, even if appropriate for broad-

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that in itself would be unconstitutional, an abrogation of first amendment rights."); 136 Cong. Rec. H9411 (Oct. 11, 1990) (statement of Rep. Richardson) ("The legislation that we have in front of us says very clearly that the NEA may not fund obscenity and the determination of obscenity is left to the courts not politicians, not bureaucrats. But the courts, among juries of average people.").

[14] The NEA refers to a 1989 statute that prohibits any person from knowingly using the telephone to make "any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent. . . ." 47 U.S.C. § 223(b)(2)(A). The FCC defined "indecent communication" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary standards for the telephone medium." *Information Providers' Coalition v. F.C.C.*, 928 F.2d 866, 874 (9th Cir. 1991) (holding regulation is not unconstitutionally vague).

[15] When Congress enacted the "decency and respect" provision, it rejected a rival amendment, the Regula amendment. The Regula amendment would have required the NEA to judge grant applications according to the decency standard articulated in *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 731-32, 98 S.Ct. 3026, 3030-31, 57 L.Ed.2d 1073 (1978)—the same standard adopted by the FCC in the "dial-a-porn" context. *See Information Providers' Coalition*, 928 F.2d at 874 (noting that the FCC's definition of "indecent communication" was lifted from the broadcast regulation at issue in *Pacifica*).

casting.[16] Moreover, unlike the statute implemented by the FCC's regulation, § 954(d)(1) is not aimed solely at indecent speech harmful to minors, but requires the NEA to judge *all* grant applications according to both "general standards of decency *and* respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1) (emphasis added). Nothing in § 954(d)(1) or its legislative history suggests the NEA may choose to apply the "decency and respect" provision to some funding applications and not to others or that it may ignore the "respect" criterion when it does apply the provision.

C.

NEA and the dissent argue the "decency and respect" provision is not subject to a vagueness challenge because it does not regulate conduct directly but merely subsidizes speech. Although the need for fair warning may be less when a statute does not directly regulate conduct, the need for specific standards to prevent arbitrary and discriminatory application of provisions that touch upon speech may be even greater when a statute subsidizes speech and the risk that the provision on its face will inhibit speech remains. *See Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298; *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 514 (9th Cir.1988) (holding void for vagueness a regulatory provision exempting from import duties certain

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[16] 136 Cong. Rec. H9680 (Oct. 15, 1990) (statement of Rep. Coleman) ("[T]he Regula amendment is in fact imposing a standard created by the Supreme Court to protect children listening to the radio, and he is applying it to everyone, including adults, by his amendment. . . . Coming out over the airwaves is one thing. Going to a theater performance is another.").

types of written materials); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1039 (D.C. Cir. 1980) (holding void for vagueness a tax exemption for educational and charitable organizations).[17]

NEA also argues that the decency provision is not subject to a vagueness challenge because it merely directs the Chairperson to promulgate regulations and establish procedures to govern applications for funding; such regulations and procedures may be subject to the void-for-vagueness test, but the direction to the Chairperson to establish them is not. This argument rests on the interpretation of § 954(d)(1) rejected earlier. Section 954(d)(1) is not a broad grant of regulatory authority which the Chairperson may implement in a discretionary manner, but a directive to the NEA to judge grant applications according to standards of "decency and respect."

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[17] Our conclusion is not affected by *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) and *Regan v. Taxation with Representation*, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). Neither case involved a vagueness challenge. Moreover, in *Bullfrog Films* we held a duty exemption void for vagueness while recognizing the general principles announced in Regan. And, as we discuss more fully in Part II, Rust is of limited applicability in light of the reasoning of *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, — U.S. ——, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), differentiating government programs that encourage private speech from government programs that use private speakers "to transmit specific information pertaining to [government] program[s]." *Id.* at ——, 115 S.Ct. at 2519. The NEA is a quintessential example of a government program designed to encourage private speech, rather than one that seeks to use private individuals for a particular government purpose, such as the dissent's example of commissioning an artist to create a bust of Lincoln for display in a public building.

* * *

The "decency and respect" provision was enacted to prevent the funding of particular types of art. To that end, it places a mandatory duty on the Chairperson to ensure that grant applications are judged according to "general standards of decency and respect for the diverse beliefs and values of the American public." The Chairperson has no discretion to ignore this obligation, enforce only part of it, or give it a cramped construction. Rather, the Chairperson, Council, and advisory panels must examine each grant application to determine if it comports with "general standards of decency" and shows "respect for diverse beliefs and values" as they subjectively understand these terms. The record indicates this is exactly how the Chairperson and Council interpreted the provision prior to this litigation.

So construed, the "decency and respect" provision violates due process because "no standard of conduct is specified at all," *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971), and the statute thus provides no "ascertainable standard for inclusion and exclusion." *Smith v. Goguen*, 415 U.S. 566, 578, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974). Without doubt, persons "of common intelligence must necessarily guess at [the] meaning and differ as to [the] application" of the terms "decency" and "respect." *See Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). These terms are inherently ambiguous, varying in meaning from individual to individual. *See Smith*, 415 U.S. at 573, 94 S.Ct. at 1247 ("[W]hat is contemptuous to one . . . may be a work of art to another."); *Coates*, 402 U.S. at 614, 91

S.Ct. at 1688 ("Conduct that annoys some people does not annoy others."); *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) ("[O]ne['s] vulgarity is another's lyric."). The content of the term "diverse beliefs and values of the American public" is also impossible to define. The individual members of a pluralistic society, and particularly our own, have a great variety of beliefs and values, largely unascertainable. *See Bullfrog Films*, 847 F.2d at 513.

Since it is not susceptible to objective definition, the "decency and respect" standard gives rise to the danger of arbitrary and discriminatory application.[18]

[18] The dissent suggests that it is untenable to find the "decency" and "respect" criteria impermissibly vague without also holding unconstitutional the statute's provision that "artistic excellence and artistic merit are the criteria by which applications are judged." 20 U.S.C. § 954(d)(1). The short answer is that appellants have challenged only the "decency" and "respect" criteria, and therefore only these criteria are before us. The application of the "void for vagueness" doctrine to the criteria of "artistic excellence and artistic merit" may present quite different considerations.

One obvious difference may be the extent to which the two sets of criteria implicate the policy concerns underlying the "void for vagueness" doctrine. *See* generally *Bullfrog Films*, 847 F.2d at 512 (vague laws are objectionable because they "trap the innocent by not providing fair warning," invite arbitrary and discriminatory enforcement, and discourage the exercise of constitutional rights). A second difference that may affect the outcome is the context in which the criteria are applied and the characteristics of the decision makers. Funding applications are reviewed by advisory panels composed of artists and "lay individuals who are knowledgeable about the arts." 20 U.S.C. § 959(c)(2). Recommendations of the advisory panels are reviewed by the National Council of the Arts, which is composed of persons to be selected "from among the private citizens of the United States who (A) are widely recognized for

It grants government officials power to deny an application for funding if the application offends the officials' subjective beliefs and values. Inevitably, NEA's decision not to fund a particular artist or project as indecent or disrespectful will depend in part on who is judging the application and whether that official agrees with the artist's point of view. Under such a grant of authority, funding may be refused because of the artist's political or social message or because the art or the artist is too controversial. This danger is especially pronounced because a vague statute effectively shields decisions from review. Where First Amendment liberties are at stake, such a grant of authority violates fundamental principles of due process.

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their broad knowledge of, or expertise in, or for their profound interest in, the arts and (B) have established records of distinguished service, or achieved eminence, in the arts." 20 U.S.C. § 955(b).

Such decision makers possess an expertise in determining "artistic excellence and artistic merit" that will guide their application of these criteria; they have no corresponding expertise in applying such free-floating concepts as "decency" and "respect." As then-NEA Chairperson Frank Hodsoll testified, "I don't see any way for a Federal panel . . . expert in the arts, not expert in community standards . . . to make determinations for the entire Nation as to what is acceptable or what is not going to be patently offensive." *Reauthorization of Foundation on the Arts and the Humanities Act of 1965, Joint Hearings Before the Subcomm. on Select Education & the Subcomm. on Post-secondary Education of the Comm. on Education and Labor*, 99th Cong., 1st Sess. 552 (1985).

II.

Our holding that § 954(d)(1) is unconstitutionally vague effectively disposes of this case. However, in view of the dissent's argument that the government may restrict the content of speech it funds, we briefly explain why the First Amendment's[19] prohibition on content- and viewpoint-based restrictions provides an alternate ground for our decision.

"It is axiomatic" that under the First Amendment, "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516; *see also Action for Children's Television v. F.C.C.*, 58 F.3d 654, 659 (D.C. Cir. 1995). A content-based restriction on speech is therefore presumed unconstitutional, *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516, and must be subjected to " 'the most exacting scrutiny.'" *Texas v. Johnson*, 491 U.S. 397, 412, 109 S.Ct. 2533, 2544, 105 L.Ed.2d 342 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S.Ct. 1157, 1164, 99 L.Ed.2d 333 (1988)). To survive this scrutiny, the government must advance a compelling interest served by its regulation of the content of protected speech, and the regulation must be narrowly tailored to serve that interest. *Sable Communications v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989); *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, ___ U.S. ____, ____, 116 S.Ct. 2374, 2385, 135 L.Ed.2d 888 (1996) (government

[19] Art is protected by the First Amendment. As the Supreme Court noted in *Miller v. California*, "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value." 413 U.S. at 34, 93 S.Ct. at 2620.

may directly regulate speech "to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech"); *Action for Children's Television*, 58 F.3d at 659.

The presence of government funding alters this framework somewhat. The government may make content-based choices "when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2518. Thus, the Supreme Court has upheld regulations that granted tax deductions for veterans' groups but not for other charitable groups engaged in lobbying, *see Regan v. Taxation With Representation*, 461 U.S. 540, 545-48, 103 S.Ct. 1997, 2000-02, 76 L.Ed.2d 129 (1983), and barred recipients of federal family planning funds from providing information on abortion. *Rust v. Sullivan*, 500 U.S. 173, 200, 111 S.Ct. 1759, 1776, 114 L.Ed.2d 233 (1991). As the Court explained in *Rust*, "when the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Id.* at 194, 111 S.Ct. at 1773.

Government funding does not invariably justify government control of the content of speech, however. In *Rust*, the Court cautioned that its holding would not apply to public fora or to universities, which occupied "a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted." *Rust*, 500 U.S. at 200, 111 S.Ct. at 1776.

In addition, *Rust* and *Rosenberger* identify two related contexts in which the government may subsidize speech only if it does so in a way that is viewpoint-neutral. Neutrality may be required because the area is a "traditional sphere of free expression," *Rust*, 500 U.S. at 200, or because the government has declared its intention to "encourage a diversity of views from private speakers." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519. Both approaches support the district court's conclusion that government funding of the arts, in the circumstances of this case, must be viewpoint- neutral.

As the district court explained, the arts, no less than the university, are "at the core of a democratic society's cultural and political vitality," *Finley*, 795 F. Supp. at 1473. The district court's analysis is full and cogent, and we need not repeat it here.[20] Similarly, Congress has clearly indicated the NEA's purpose is to support a diverse array of artistic expression. Even the most cursory review of the NEA's enabling statute reveals this intent. In its findings, Congress emphasized that a democracy must "honor and preserve its multi-cultural artistic heritage as well as support new ideas" and declared its intent "to help create and sustain ... a climate encouraging freedom of thought, imagination, and

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[20] NEA contends the district court erred by extending *Rust* to the arts funding context, arguing the *Rust* exceptions are limited to "special places" and "special relationships." This argument is foreclosed by *Rosenberger*, which took a much broader view of the First Amendment's applicability to subsidized speech. *See Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2517 (university's student activities fund, while not a traditional physical forum, was subject to First Amendment constraints).

inquiry." 20 U.S.C. § 951(10), (7). The Senate Report accompanying the legislation emphasized that "freedom of artistic and humanistic expression" was to be given "the fullest attention" and that "[c]onformity for its own sake is not to be encouraged, and ... no undue preference should be given to any particular style or school of thought or expression." *See* S.Rep. No. 300, 89th Cong., 1st Sess. 4 (1965). The House reaffirmed this view in adopting the 1985 amendments to the NEA's governing legislation, urging NEA to be "more responsive to funding programs that represent the many traditions in our heritage and the full cultural diversity of our citizens. . . . [T]he [funded] programs should be open and richly diverse, reflecting the ferment of ideas which has always made this Nation strong and free." H.R. Rep. No. 274, 99th Cong., 1st Sess. 13, *reprinted in* 1985 U.S.C.C.A.N. 1055, 1058. The NEA and it programs were created to encourage diverse private speech and not, as the dissent suggests, to engage in "speech for hire."

The First Amendment prohibits the government from "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516 (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)); *see Johnson*, 491 U.S. at 414, 109 S.Ct. at 2545 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Even when the government is funding speech, it may not distinguish between speakers on the basis of the speaker's viewpoint or otherwise "ai[m] at the suppression of

dangerous ideas." *Regan*, 461 U.S. at 548, 103 S.Ct. at 2002 (*quoting Cammarano v. United States*, 358 U.S. 498, 513, 79 S.Ct. 524, 533, 3 L.Ed.2d 462 (1959)); *see Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158-59, 66 S.Ct. 456, 462-63, 90 L.Ed. 586 (1946).

Therefore, we cannot agree with NEA's assertion that the "decency and respect" provision does not reflect viewpoint discrimination.[21] In *Rosenberger*, the Supreme Court found viewpoint discrimination in a university regulation that "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints." ___ U.S. at ____, 115 S.Ct. at 2517. Central to the court's decision was the fact that under the regulation, *any* topic treated from a religious perspective would be denied funding. *See id.* ("Religion . . . provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments."). Here too, it is the treatment of a subject, not the subject itself, that is disfavored. Two depictions of the same subject matter—an American flag, for example—could be treated differently if NEA believed one depiction symbolized an "indecent" perspective or demonstrated disrespect for "the diverse beliefs and values of the American public," and the other did not.

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[21] NEA and the dissent rely on two cases, *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir. 1976), and *Piarowski v. Illinois Community College Dist.* 515, 759 F.2d 625 (7th Cir. 1985). Both cases are distinguishable. Moreover, both were decided before *Rosenberger*, and to the extent they conflict with this most recent teaching on viewpoint discrimination, are not persuasive.

The dissent argues we have erred in applying the body of law for regulation of speech and generally available entitlements to prizes. According to the dissent, since the NEA grants are a prize given to a select few, rather than a generally available benefit, the government can choose to support only a certain viewpoint. The Supreme Court explicitly rejected a similar argument by the University in *Rosenberger*. As the Court explained, "[t]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." ___ U.S. at ____, 115 S.Ct. at 2519. Although NEA awarded only 88 grants from an applicant pool of 5,168, it cannot provide those scarce grants to favor a particular viewpoint. See *id.* at ____ - ____, 115 S.Ct. at 2519-20 (rejecting the University's argument that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible").

NEA contends the "decency and respect" provision is permissible because it can be implemented in a viewpoint-and content-neutral way.[22] As we have

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[22] On similar grounds, NEA urges us not to reach plaintiffs' First Amendment claims. However, we disagree with NEA's assertion that the district court's First Amendment decision was "obviously premature" because it rested on assumptions about how the Chairperson would implement § 954(d)(1)'s "decency and respect" provision. Under the interpretation originally proposed by NEA, the statute was implemented when the Chairperson, taking "decency and respect" into consideration, decided no changes in the application process were needed. We rejected this interpretation in Part I(A), *supra*, and NEA now argues we should avoid the First Amendment issues because "there is no way to predict what the Chairperson's new manner of implementing the statute would be." Plaintiffs bring a facial challenge, however. Although NEA is entitled to promulgate regulations interpret-

explained, however, § 954(d)(1) on its face requires NEA to take "decency" and "respect" into account in considering grant applications. Like the funding restriction at issue in *Rosenberger*, the "decency and respect" provision clearly focuses on the content of the speech at issue; it "has a speech-based restriction as its sole rationale and operative principle." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519.

The "decency and respect" provision authorizes viewpoint discrimination, an "egregious form of content discrimination." *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2516. Because the government has made no attempt to articulate a compelling interest served by the provision,[23] § 954(d)(1) cannot survive strict scrutiny.[24]

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ing the statute, we are not obligated to withhold judgment while the agency does so.

[23] Amici suggest Congress may have wished to avoid requiring taxpayers to fund work they found offensive. However, neither protecting people from offensive and indecent speech nor protecting the taxpayer from unwanted expenditures is a compelling interest sufficient to justify content-based restrictions on speech. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Sable*, 492 U.S. at 126, 109 S.Ct. at 2836 (First Amendment protects speech that is "indecent but not obscene"); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 385 n. 16, 104 S.Ct. 3106, 3120 n. 16, 82 L.Ed.2d 278 (1984) (taxpayers' opposition to expenditure of government funds cannot "be invoked to justify a congressional decision to suppress speech").

[24] The district court concluded § 954(d)(1) was unconstitutionally overbroad because it was a content-based restriction that "swe[pt] within its ambit speech and artistic expression which is protected by the First Amendment." *Finley*, 795 F. Supp. at 1476. Although we frame our discussion in terms of strict scrutiny, we agree with the district court's conclusion.

III.

The "decency and respect" provision of § 954(d)(1) is void for vagueness under the Fifth Amendment, and impermissibly restricts plaintiffs' First Amendment rights as well.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

First Amendment law has taken some odd turns lately. We now live in a legal context prohibiting display of a cross or menorah on government property. *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir.1996), *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir.1996). But if a cross is immersed in urine, a government grant cannot be withheld on the ground that the art would offend general standards of decency and respect for the religious beliefs of most Americans. The government, under today's decision, cannot even consider "general standards of decency and respect for the diverse beliefs and values of the American public" when it gives artists grants. Yet we penalize private employers for slowness in firing employees who do not show decency and respect for other employees. *See Steiner v. Showboat Operating Company*, 25 F.3d 1459 (9th Cir. 1994). This self-contradictory silliness is not built into the Bill of Rights. The First Amendment does not prohibit the free exercise of common sense.

Artists, and for that matter, non-artists, are constitutionally entitled to express themselves indecently and disrespectfully toward the beliefs and values of as much of the American public as they like. Indecency sometimes helps to communicate an idea effectively, and it is constitutionally protected. *See Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Lenny Bruce's monologues needed offensive indecency to accomplish their legitimate artistic objective. The same language that gave rise to liability in *Steiner* was essential to Allen Ginsberg's artistic expression in *Howl* and *Kaddish*. The great Modigliani nudes are frankly erotic and focus on the models' pubic hair; our Constitution unquestionably protects them from censorship. Less artistically distinguished attempts to communicate by means of offensiveness and indecency are also entitled to First Amendment protection. Molly Bloom's soliloquy, Aristophanes' jokes about passing gas, Shakespeare's double entendres, the indecent kiss in Chaucer's *Miller's Tale*, and countless works by lesser artists, such as Samuel Clemens' *1601* and Vladimir Nabakov's *Lolita*, are all part of the ancient artistic tradition of using the impolite or indecent in art. Every general art history textbook reproduces and discusses Edouard Manet's *Luncheon On the Grass*, a painting of a nude woman looking at the artist while two fully clothed men sit next to her and talk to each other. The content and viewpoint doubtless offend, but the art history books are constitutionally protected regardless. There can be no constitutional excuse for allowing the government to censor art on grounds of indecency or offensiveness. I hope that it is still as clear as it was when *Cohen* came down that anyone in America, artist or not, has a

constitutional right to express himself indecently and offensively.

That offensive or indecent expression cannot be censored does not mean that the government has to pay for it. By drawing the line between private expression and government conduct, we preserve liberty for individual expression, while preserving democracy for governmental decisions. Any time government enters a previously private sphere of conduct, the line becomes blurred, and the issues difficult. Government subsidy of art was an easy issue when the Medicis hired artists—the Medicis could freely impose their preferences. But when a democratic government pays artists to stick their thumbs in the public's eye, the public naturally becomes annoyed, and attempts to exercise its ordinary authority in a democracy to control through Congress how tax monies are spent.

Whether government can consider content and viewpoint depends on whether the money it gives out is generally available to all who meet some basic standard, or whether it is a prize given to a select few. Only 88 out of 5168 applicants for Visual Artists Fellowships won grants in fiscal year 1994. *1994 Annual Report, National Endowment for the Arts* 10. Applying for an NEA arts grant is not like applying for welfare, social security, a tax exemption, or a student activity grant. NEA grants are prizes for the fortunate few, not entitlements.

The case at bar does not involve government censorship. If Congress had prohibited artists from expressing themselves indecently or disrespectfully, the Constitution would make such a law null and void. The NEA statute before us is not such a law. It does not restrict what artists do. It restricts what the

NEA can do. This case is about whether the American people can require a government agency to consider, in giving grants to very few of the many artists in the country, "general standards of decency and respect for the diverse beliefs and values of the American public."

Our decision today creates a conflict with the only other circuits to have confronted a similar issue. *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir.), *cert. denied*, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976). In *Advocates*, New Hampshire denied an NEA grant to a literary magazine because the governor and state arts commission thought a poem it published was indecent. The First Circuit, rejecting the First Amendment challenge, explained that denial of a grant was not suppression of speech, and the grant selection process necessarily discriminated based on content:

> [P]ublic funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants.

Id. at 795. *Advocates* suggests that every disappointed grant applicant has the same First Amendment right of self-expression, but that does not mean that every disappointed grant applicant has a First

Amendment claim. *Id.* at 795-96. Suppose the NEA arts panel discriminates by viewpoint against an excellent artist whose work is too conventional for the panel's tastes—an artist with the superb technique of a Robert Mapplethorpe and the vision of a Norman Rockwell. And suppose it discriminates against another whose art is too indecent and offensive. And another, whose viewpoint is interesting but whose technique is less than excellent. Do all have First Amendment claims under the majority decision? Only the one who creates indecent art? Only the ones with excellent technique? It is impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression, decent and indecent.

The Seventh Circuit ruled similarly to the First Circuit, in *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir.1985). The chairman of the art department hung his stained glass panels of such subjects as "the naked rump of a brown woman, and sticking out from (or into) it a white cylinder" in the college's gallery near the main entrance to a heavily trafficked building. The college told him to move three panels to a less heavily trafficked fourth floor display space, after receiving "complaints from students, cleaning women, and black clergymen." *Id.* at 628. The main entrance space was especially desirable, but not a public forum, and not available to all. The artist lost his case.

The Seventh Circuit distinguished between what an artist is free to create, and what the government must display.

> If Claes Oldenberg, who created a monumental sculpture in the shape of a baseball bat for display in a public plaza in Chicago, had created instead a giant phallus, the city would not have had to display it next to a heavily trafficked thoroughfare.

Id. at 630.

Advocates points out the resemblance of a government grant program to a government auditorium providing space for artistic performances. If it is a public forum, then neutrality is required by the First Amendment. *Advocates*, 532 F.2d at 796. But if the space is available only to a select few invited exhibitors as in *Piarowski*, then the government, already excluding much constitutionally protected art, need not be neutral toward offensive or indecent art. That is why, in the Piarowski example, Chicago would be free to discriminate in favor of baseball bats and against phalluses in the hypothetical display.

The majority tries to distinguish the First Circuit and Seventh Circuit cases on the ground that they came down before *Rosenberger v. Rector & Visitors of University of Virginia*, ___ U.S. ____, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and *Rosenberger* now prohibits the content or viewpoint discrimination they allowed. That misreads *Rosenberger*. The university which lost *Rosenberger* paid expenses for virtually all student organizations, but denied the money to plaintiffs because they expressed a Christian viewpoint. In its zeal to steer clear of the establishment clause, the university, like the school district in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), overlooked the free speech clause.

Rosenberger holds that a university which makes money generally available for student groups' expenses, to encourage a diversity of views rather than to express its own, cannot discriminate against an applicant based on that applicant's viewpoint. *Rosenberger* teaches that when government makes a benefit generally available to all within a diverse class, it cannot make an exception based on what a particular applicant wishes to say. This extends *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), from space to money, thereby preventing discrimination against speech on the ground that it was religious. A public forum can be created by money, not just real estate. This is because speech is often disseminated by print and electronics, rather than by standing in front of people and talking to them. *Cf. Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 634, 46 L.Ed.2d 659 (1976).

We and the District of Columbia Circuit had decided, before *Rosenberger*, what might be classified as money-as-a-public-forum cases. In *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir.1980), we held that customs duties exemptions for any educational or cultural materials could not exclude propaganda films based on their content and viewpoint. In *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C.Cir. 1980), the District of Columbia Circuit held that a tax exemption generally available to educational organizations could not be denied based on a regulation requiring full and fair exposition of facts enabling a reader to draw an independent conclusion. Under these cases, all applicants in the class were entitled to the financial benefit from the government, unless the content of their speech was contrary to govern-

ment standards. By contrast, in the case at bar, no applicant is entitled to the financial benefit.

The case at bar would be analogous to *Rosenberger* (and I would join the majority in rejecting the "decency and respect" clause as unconstitutional), if the NEA gave out grants to virtually all artists except for those whose work violated "general standards of decency and respect for the diverse beliefs and values of the American public." Arts grants would then be the financial equivalent of a tax credit for all artists, and under *Rosenberger*, *Big Mama Rag* and *Bullfrog*, the financial benefit could not be conditioned on a vague and content- or viewpoint-based criterion like the "decency and respect" formula. Much as parade permits may be allocated on a first come first served principle, but not to favor particular viewpoints, arts grants would have to be allocated on some neutral principle, such as first come first served, or random selection. *Cf. Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519.

It is not the case that whenever the government gives money to someone for talking, the recipient may say, with the government's money, whatever he or she likes. The government can hire people to say what it wants, and require them to say it.

> [W]hen government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. *Rosenberger*, ___ U.S. at ____, 115 S.Ct. at 2519 (explaining *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)). But when the government gives money to encourage a diversity of views from private speakers in a class not defined by what they say, such as university students, it "may not silence the expression of selected viewpoints." *Id.*

The majority misreads *Rosenberger's* rejection of the University of Virginia's argument that scarcity of money justified viewpoint discrimination. *Rosenberger*, ___ U.S. at ____ - ____, 115 S.Ct. at 2519- 20. The context was a program in which grants went to virtually all speakers but those with a Christian viewpoint, not to everyone except for a few prize-winners. The Court explained that the Student Activities Fund at the University of Virginia "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at ____, 115 S.Ct. at 2517. This is the concept which I have expressed perhaps more crudely, as teaching us that a public forum can be created by money, not just real estate. Had the University of Virginia set up a prize fund, for student groups which contributed the most to the betterment of secular civic life in Charlottesville, the Christian student groups would have had no constitutional claim of discrimination had they lost. Had the NEA grant program been structured to award grants to virtually all artists, then the plaintiffs in the case at bar would be entitled to prevail under *Rosenberger*. The majority uses principles for entitlement and regulation cases in a prize case. The principles are by and large right, the application wrong.

When the government gives a prize rather than an entitlement, it necessarily discriminates by content

and viewpoint. Congress decided to foster the arts, but many Congressmen were doubtless aware of artists' tendency since the romantic period to challenge the conventional. Thus Congress imposed several content and viewpoint criteria for arts grants. These include "artistic excellence," promoting cultural diversity, and reflecting the culture of inner cities, rural areas, and tribal communities.[25] Congress

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[25] **(c) Program of contracts, grants-in-aid, or loans to groups and individuals for projects and productions; traditionally underrepresented recipients of financial assistance.** The Chairperson, with advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support—

(1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

(2) projects [and] productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographical or economic reasons;

(3) projects [and] productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or standards of professional excellence;

(4) projects and productions which have substantial artistic and cultural significance and that reach, or

reflect the culture of, a minority, inner city, rural, or tribal community;

(5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) programs that enhance managerial and organizational skills and capacities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purposes of broadening public access to the arts; and,

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection. . . . .

(d) Application for payment; regulations and procedures. No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with the regulations and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

(1) artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public*; and

(2) applications are consistent with the purpose of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this Act from the National

thereby discriminated against non-artistic expressions of opinion, artistic expression favoring cultural homogeneity, and art reflecting suburban culture. Norman Rockwell and Ansel Adams could reasonably complain, were they applying for grants, that the statute constitutes viewpoint discrimination against their artistic expression.

Of course the statutory criteria are vague. "Decency and respect for the diverse beliefs and values of the American people" is vague. "Artistic excellence" and "artistic merit" are also vague, and could not be proper criteria for censorship or discrimination in an entitlement program. The constitution would not allow the government to censor expression on the ground that it was not art, or though art, was not excellent art. But this does not mean that the government cannot condition prizes on the excellence of art.

Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify "artistic excellence":

> In certain kinds of writing, particularly in art criticism and literary criticism, it is normal to come across long passages which are almost completely lacking in meaning. Words like *romantic*, *plastic*, *values*, *human*, *dead*, *sentimental*, *natural*, *vitality*, as used in art criticism, are strictly meaningless, in the sense that they not only do not point to any discoverable object, but are hardly ever expected to do so by the reader. When one critic writes, "The outstanding feature of Mr. X's work is its living quality," while another writes, "The immediately striking thing about Mr. X's works is its peculiar deadness," the reader accepts this as a simple difference of opinion. If words like *black* and *white* were involved, instead of the jargon words *dead* and *living*, he would see at once that the language was being used in an improper way.

George Orwell, *Politics and the English Language, in A Collection of Essays* 156, 161-162 (emphasis in original) (essay dated 1946).

The most used art history text points out the vagueness of the entire NEA grant scheme:

> But if we must give up any hope of a trustworthy rating scale for artistic quality, can we not at least expect to find a reliable, objective way to tell art from non-art? Unfortunately, even this rather more modest goal proves so difficult as to be almost beyond our powers.

H.W. Janson, *History of Art* 9 (1962). It took a century and a half for most critics to agree that photography could be art. Some have not yet admitted jazz to the pantheon, many, rock and roll. Some disagree on whether Bernstein's *West Side Story* is art or mere entertainment, let alone excellent art. If the constitutional law principle prohibiting vague laws relating to speech applied to NEA grants, then we

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> Endowment for the Arts. The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the projects, production, workshop, or program for which the applicant requested financial assistance is or is not obscene.

20 U.S.C. § 954(d) (emphasis added). The 1990 amendment added the emphasized language to 20 U.S.C. § 954(d).

could no more let the government give out grants for excellent art, than let it censor literary and artistic expressions which in the opinion of some customs agent or policeman (or art critic) were bad art.

The majority says that the vagueness of "artistic" and "excellence" are constitutionally permissible, unlike "decency" and "respect," because the people making the decisions are experts. Maj. op. at 680-81, n. 18. By that principle, it would be permissible to let the government censor speech with vague laws, so long as the censors were experts in the field being censored. The argument is wrong, because the panel members' purported expertise does not give fair warning to artists of what will get them grants and what will not. Nor are the purported experts' choices sufficiently constrained by "artistic" and "excellence" to prevent arbitrariness. Quite a few NEA grants have gone to activities which many experts would deem not excellent, or not art. There is no principled way to keep the arts grants but strike the decency and respect clause. Either Congress can provide for arts grants with vague criteria, or it cannot provide for them at all.

Artists seeking grants have no property right to them, and their liberty to express themselves as they choose is not regulated by the grants. Vagueness law has been developed under the Fifth Amendment to protect people from the taking of liberty or property without fair notice of what they may not do, and without protection against arbitrary enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). First Amendment vagueness doctrine applies to government action relating to speech if the government regulates speech or conditions a generally available benefit upon the

content of speech. *See Rust v. Sullivan*, 500 U.S. 173, 200, 111 S.Ct. 1759, 1776, 114 L.Ed.2d 233 (1991) ("conditions attached to expenditures of Government funds"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051, 111 S.Ct. 2720, 2732, 115 L.Ed.2d 888 (1991) ("prohibition against vague regulations of speech"). An artist applying for an NEA grant has no formula, and is not entitled to one, for the painting or performance which will produce a grant. None of the purposes of vagueness law apply to prizes.

The majority construes the statute as though it prohibited the NEA from awarding grants to offensive or indecent art. I doubt it would matter if the statute said that. Congress may be free to condition these scarce NEA grants on content. If Congress hired a sculptor to create a bust for the Capitol, it could tell him to do a bust of Abraham Lincoln, and prohibit him from doing a bust of John Wilkes Booth. Or it could tell the sculptor to make busts only of people who had served in the Senate, or perhaps only of "great" Senators, despite the vagueness of that criterion. That much is clear under *Rust*. Just as Fulbright grants to foreign students may be conditioned on "directing their talents and initiative into channels which will make them more effective leaders," 22 U.S.C. § 2454(e)(3), prizes for only a few applicants, to which no one is entitled, may be conditioned on vague criteria designed to serve particular congressional objectives.

Even if we were to suppose that a specific prohibition of NEA grants based on content or viewpoint would be unconstitutional, the majority has found prohibitions in the statute which are not there. We should not read a statute as though it prohibited what it does not, and then hold it unconstitutional for the

imaginary prohibition. The statute does not say that artists must "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." It says "the Chairperson" of the National Endowment of the Arts must use "artistic excellence" and "merit" as criteria, "taking into consideration," etc.

The words "take into consideration" mean take into consideration, no more, no less. The word "consider" in its ordinary usage means "to reflect on" or "think about with a degree of care or caution." *See Webster's Third New International Dictionary* 483 (1981). In deciding whether to buy a new car, *one takes into consideration* the expense, but that does not mean one always decides against buying a new car. A requirement that "due consideration and weight shall be given" to something does not make the thing an absolute requirement. *See Heirens v. Mizell*, 729 F.2d 449, 460 (7th Cir.1984) (parole board had to consider a prisoner's record but could decide against parole despite a good record). A court of appeals appoints a federal public defender "after considering recommendations from the district court." 18 U.S.C. § 3006A(g)(2)(A). That means that we must give serious thought to the district court's recommendations, but we are not required to follow them.

Likewise, the NEA might think seriously about Ginsberg's extensive use of vulgar language in *Howl* and *Kaddish*, and decide against funding readings of his poems in junior high schools. But after considering the indecency and offensiveness, the NEA could lawfully fund readings in colleges. It might likewise decide for or against funding showings of artistically excellent but highly offensive works such as Leni Riefenstahl's Nazi propaganda movie, *Triumph of the*

Will, or D.W. Griffith's artistically important movie *Birth of a Nation*, which glorified the Ku Klux Klan. If someone on an advisory panel said "I don't think we can consider the indecency or disrespect for American values of the art—we should fund the grants because the presentations will be of excellent art, and that is all we should consider," another panel member could persuasively reply, "we can and must consider decency and respect—Congress said we should." That is what the "decency and respect" language means, and that is all it means. Chairman Frohnmayer and the members of NEA grants panels probably would have figured out that they lived in a "political world," *see* maj. op. at p. 676, n. 7, and that the NEA budget might be affected by what it did with the money, even if Congress had not given them the decency and respect criterion.

By contrast with the "take into consideration" language, Congress said that obscenity "shall not be funded." 20 U.S.C. § 954(d)(2). That language, unlike "taking into consideration," prohibits funding. The language we now hold unconstitutional tells the Council and panels to think seriously about "general standards of decency and respect for the diverse beliefs of the American public" when they give away the public's money.

The artists in the program before us are not affected by the statutory grant criterion in their use of indecency or disrespect in their art done independently of their NEA grants. If the NEA were restricted from giving grants to artists who, outside the grants, had ever done indecent or offensive work, the considerations would be different, possibly leading to a different result. *Cf. Federal Communications Commission v. League of Women Voters*, 468 U.S.

364, 399-400, 104 S.Ct. 3106, 3127-28, 82 L.Ed.2d 278 (1984) (acceptance of the government's money unconstitutionally required the recipient to conform to government speech requirements outside the time paid for by the government). The government cannot use its power to condition subsidies as a means of enforcing orthodoxy in areas traditionally open to the public for expressive activity. *Rust*, 500 U.S. at 199, 111 S.Ct. at 1776; *Regan*, 461 U.S. at 548, 103 S.Ct. at 2002.

A prize for some art naturally encourages other artists to try to produce art of the sort which they think will get them the prize, including conformity to the content and viewpoint preferences of those who award the prizes. The members of the grant committees will probably balance their personal tastes against what they fear might lead Congress to cut NEA funding. If government selects a few artists and gives them money, it will unavoidably influence the work of many more:

> I can seldom do positive good to another person without limiting him. I can, it is true, simply give him money, but even in this extreme case, where I seem to place no bonds on him, he inevitably faces the question of what conduct on his part will lead me to give money to him again.

George J. Stigler, *The Intellectual and the Market Place* 95 (1963). This is a problem of governmental involvement in what used to be a private activity, not a problem of censorship. The United States government has so much money and power that its slightest intervention to do good has the unfortunate effect of changing the entire context in which people act. But unless we are to blind ourselves to the distinction

between a relatively few arts prizes, and socializing the art industry, we cannot treat the incentive afforded by a prize as the equivalent of censorship.

The artists who brought this lawsuit may have difficulty (the record does not say) attracting enough patrons to support their art. Finley alleges in her complaint that she is a "performance artist whose performances address such issues as the sexual stereotyping and objectification of women, rape and other forms of violence against women, and the powerlessness and victimization of women and others in our society." Fleck alleges that his performances "openly challenge traditional notions of gender and sexuality" and "address AIDS, birth, death, religion, consumption in a capitalist society, and the environment." Hughes alleges that her work "addresses issues of women's power in society and women's sexuality, including lesbian relationships." Miller alleges that his "often autobiographical work addresses the relation between the individual and society, and particularly concerns social activism on issues affecting gay people, including AIDS." These works may lack the mass market of art appealing to more broadly shared sentiments.

There is no constitutional principle, however, which requires the government to replace the market and pump up the incomes of less popular artists. Government support of the arts is a policy choice, and perhaps a good one, but it is not constitutionally compelled. Lack of market appeal is an obstacle "not of [the government's] own creation." *Regan v. Taxation with Representation Wash.*, 461 U.S. 540, 549-50, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983). So long as the artists are free to perform, people are free to patronize their performances, and the artists are not

deprived of government money to which artists generally are entitled, the artists' freedom of expression is not abridged by content or viewpoint discrimination in the grant process.

The only practical guarantee of artistic freedom is private money.

> The leadership of individuals or groups who can back their beliefs financially is particularly essential in the field of cultural amenities, [and] in the fine arts. . . . If minority views are to have a chance to become majority views, it is necessary not only that men who are already highly esteemed by the majority should be able to initiate action but that representatives of all divergent views and tastes should be in a position to support with their means and their energy ideals which are not yet shared by the majority.

Friedrich A. Hayek, *The Constitution of Liberty* 125 (1960, 1978). With diverse sources of private money, majority preferences need not affect an artist's freedom or fortune, because only one or a few patrons or purchasers may suffice.

First Amendment law protects individual liberty from government, not the government from the people. The error in today's decision comes from forgetting what the First Amendment is for. The NEA "decency and respect" criterion controls, not artists, but rather a government department, the NEA. By treating legislative control over a part of government as though it were an attempt to control artists' expression, we confound the distinction between popular control of government, and government control of individuals. Majorities do not have the right to control free expression by individuals.

They most certainly do have the right to control their government. Today's decision does not protect artists from government. It protects the government from control by the elected representatives of the people.

APPENDIX B

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

No. CV 90-5236 AWT

KAREN FINLEY, JOHN FLECK, HOLLY HUGHES, TIM MILLER AND NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PLAINTIFFS

v.

NATIONAL ENDOWMENT FOR THE ARTS; AND JOHN E. FROHNMAYER, IN HIS OFFICIAL CAPACITY AS CHAIRPERSON NATIONAL ENDOWMENT FOR THE ARTS, DEFENDANTS

June 9, 1992

MEMORANDUM OPINION

TASHIMA, District Judge.

Plaintiffs are four individual performance artists ("individual plaintiffs") and the National Association of Artists' Organizations ("NAAO"). Individual plaintiffs allege that defendants the National Endowment for the Arts ("NEA") and John E. Frohnmayer

("Frohnmayer"),[1] NEA Chairperson, violated their constitutional and statutory rights by improperly denying their applications for NEA grants and by releasing to the public information from their application files. They seek declaratory and injunctive relief on their constitutional and statutory funding claims, and damages on the Privacy Act claim. In addition, all plaintiffs seek a declaration that the so-called "decency clause" of 20 U.S.C. § 954(d), enacted several months after individual plaintiffs' applications were denied, is void for vagueness and violates the First Amendment on its face.

Before the court are two motions. The first is defendants' motion for judgment on the pleadings. Defendants contend that: (1) the NEA's funding decisions are unreviewable because they are committed to agency discretion by law; (2) venue is improper as to the Privacy Act claim; and (3) plaintiffs lack standing to challenge the facial validity of the "decency clause" because they cannot establish the necessary injury.

Plaintiffs, in turn, have moved for summary judgment on their facial challenge to the "decency clause."

I. BACKGROUND

A. *Statutory framework*

The NEA was created by Congress in 1965 as part of the National Foundation on the Arts and the Humanities (the "Foundation"). In establishing the Foundation, Congress found that "it is necessary and

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[1] Frohnmayer resigned as Chairperson of the NEA after this action was commenced. No successor has been appointed. Anne-Imelda Radice is the acting Chairperson.

appropriate for the federal government to help create and sustain not only a climate encouraging freedom of thought, imagination and inquiry but also the material conditions facilitating the release of . . . creative talent." 20 U.S.C. § 952(5).[2] It was the intent of Congress to encourage "free inquiry and expression," and to insure that "conformity for its own sake is not to be encouraged" and that "no undue preference should be given to any particular style or school of thought or expression." 111 Cong. Rec. 13,108 (1965).

One of three components of the Foundation, the NEA is authorized to administer a program of grants-in-aid to individuals of exceptional talent engaged in or concerned with the arts. 20 U.S.C. § 954(c). The NEA acts through its Chairperson and a 26-member National Council on the Arts (the "Council"), all of whom are appointed by the President, by and with the advice and consent of the Senate. 20 U.S.C. § 954(b)(1) & § 955(b). The Chairperson is the ultimate decision maker; however, the Chairperson is prohibited from approving or disapproving any grant application until he or she has received the recommendation of the Council on such application.[3]

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[2] The Arts, Humanities, and Museums Amendments of 1990 (the "1990 Amendments"), Pub.L. No. 101-512, § 101, 104 Stat. 1961, made a minor grammatical change in and redesignated this clause as subsection (7). *See* 20 U.S.C. § 952(7). Because the funding denials occurred prior to the 1990 Amendments, citations are to the pre-amendment version of the statute, except where otherwise indicated.

[3] In the case of an application involving $30,000, or less, the Chairperson may approve or disapprove such request without first receiving the recommendation of the Council if such action is taken pursuant to the terms of a delegation of

20 U.S.C. § 955(f). The Council, in turn, is required to meet at the call of the Chairperson, and 14 members of the Council constitute a quorum. 20 U.S.C. § 955(d). The Chairperson is also authorized to utilize panels of experts to review funding applications. 20 U.S.C. § 959(a)(4).[4]

On November 5, 1990, approximately four months after individual plaintiffs' applications were denied, in the 1990 Amendments, Congress amended the NEA's governing statute in several respects. Among the changes was the addition of a provision requiring that "general standards of decency and respect for the diverse beliefs and values of the American public" be taken into consideration in making funding determinations. 1990 Amendments, Pub.L. No. 101-512, § 103(b), 104 Stat. 1963, codified at 20 U.S.C. § 954(d).

B. *Political context of the denials*

At least since 1989 and continuing through to the present, the NEA has been the target of congressional critics and private interest groups for funding works, inter alia, that express women's anger over male dominance in the realm of sexuality or which endorse equal legitimacy for homosexual and heterosexual practices.[5] For example, in the Spring of

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authority from the Council to the Chairperson, and each such action is reviewed by the Council. 20 U.S.C. § 955(f).

[4] The 1990 Amendments made mandatory the Chairperson's use of advisory panels to review funding applications. *See* 20 U.S.C. § 959(c).

[5] The facts in this section are drawn from the complaint, which must be taken as true for purposes of defendants' motion for judgment on the pleadings. *See, e.g., General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist*

1989, congressional critics assailed the NEA for funding two controversial projects: a photography exhibit by Robert Mapplethorpe, which included homoerotic images, and an exhibit by Andres Serrano[6] entitled "Piss Christ," which was criticized as sacrilegious. *E.g.*, 135 Cong. Rec. S5594 (daily ed. May 18, 1989) (statement of Sen. D'Amato); 135 Cong. Rec. S5805 (daily ed. May 31, 1989) (statement of Sen. Gorton). These two exhibits were frequently cited by members of Congress in debates during the Summer of 1989 over budget allocations for the NEA. *E.g.*, 135 Cong. Rec. H3637, H3640 (daily ed. Jul. 12, 1989) (statements of Reps. Rohrabacher and Dannemeyer).

These funding debates were followed by a series of demands by certain members of Congress for information on NEA-funded artists whose work addressed political and sexual issues. In one instance, a senator requested that the General Accounting Office investigate apparent violations of § 304 of the FY 1990 NEA appropriations bill.[7] The senator listed among such

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Congregational Church, 887 F.2d 228, 230 (9th Cir.1989), *cert. denied*, 493 U.S. 1079, 110 S.Ct. 1134, 107 L.Ed.2d 1039 (1990).

[6] Serrano is one of the many amici curiae in this case.

[7] That section provided, in part:

> None of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value.

"apparent violations" three literature fellowships awarded to lesbian writers who address issues of sexuality in their work; two art exhibits, one of which incorporated images depicting homosexuality and the other of which included depictions of genital organs; and appearances by plaintiff Finley at two NEA-funded theaters.[8]

In addition, private special interest groups ran advertisements and circulated flyers condemning NEA funding of sexually-related works and in one case called for defunding of the NEA. In response to criticism by the American Family Association of one art exhibit, Frohnmayer wrote in April 1990 that its images "were disgusting and offensive to me, and undoubtedly to a large majority of the population. I would hope that with the procedures I am implementing at the arts endowment, images such as these would not again be funded."

C. *Denial of plaintiffs' applications and violations of the Privacy Act*

In the midst of this political maelstrom, individual plaintiffs each applied for funding under the Performance Artists Program. These applications were among the 90 applications reviewed by the Perform-

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Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 304(a), 103 Stat. 701, 741. The NEA's administration of § 304 was struck down in *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991).

[8] The general counsel of the NEA, Julianne Ross Davis, sent a number of explanatory letters to Henry Wray, Senior Associate General Counsel, General Accounting Office, on this subject. The summary judgment record contains six such letters, dated Apr. 3, May 2, 9, 24 & 30, and Jul. 5, 1990.

ance Artists Program Peer Review Panel (the "Panel"). The Panel unanimously recommended that the individual plaintiffs' applications be funded, along with 14 others in that category.[9]

In early May 1990, Frohnmayer asked the Panel to reconsider three of its recommendations, those for plaintiffs Fleck, Hughes and Miller. He stated that reconsideration of Finley's application was unnecessary because two of his close friends had attended a Finley show and had reported to him that it was not obscene. He arranged for an extraordinary Panel meeting by teleconference, in which he personally participated. After reconsidering the three grants, the Panel again unanimously recommended them for funding.

Shortly before the Council met to review recommended NEA grants and fellowships, a syndicated column published in Washington, D.C., reported that plaintiff Finley had been recommended to receive a grant and criticized the content of her work. The article contained a quotation from Finley's funding application, which the NEA admittedly released to the press. The column also stated that Frohnmayer had been "advised" by "friends" of the NEA to veto several grants, including Finley's, to "ease President Bush's deepening troubles with conservatives on his suspect cultural agenda."

Although the Council convened in May and acted on other categories of recommended grants, it deferred consideration of the Performance Artists Program fellowships until its August meeting, pending receipt

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[9] As a matter of practice and custom, recommendation by a peer review panel has been tantamount to the granting of an application.

of further information. In June 1990, Frohnmayer polled members of the Council by individual telephone calls regarding the Performance Artists Program fellowships. On June 28, 1990, the NEA advised individual plaintiffs that their applications had been denied.

Subsequent to these denials, a number of newspaper articles published references to or direct quotations from plaintiffs' NEA application files. A number of these articles cite the NEA as the source of this information. None of the individual plaintiffs consented to any of these disclosures.

D. *Plaintiffs' claims*

Following notification that their applications had been denied, plaintiffs filed this action. Individual plaintiffs assert that defendants violated their First Amendment rights by denying their applications on impermissible political grounds and by failing to adhere to procedural safeguards mandated by the First Amendment. They also allege that defendants violated their statutory rights under the National Foundation on the Arts and the Humanities Act of 1965, as amended, 20 U.S.C. § 954-55, by (a) basing the denials on criteria other than those set forth by statute, and (b) failing to follow the procedures mandated by statute. Individual plaintiffs also allege that defendants violated their rights under the Privacy Act, 5 U.S.C. § 552a, by violating the confidentiality of their grant applications.

After Congress amended 20 U.S.C. § 954(d) to require that "general standards of decency" be taken into account in evaluating funding applications, the NAAO joined individual plaintiffs in filing an amended complaint, challenging this new provision on Fifth

Amendment vagueness and First Amendment grounds.

II. DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS[10]

A. *First Amendment claims*

The amended complaint alleges that defendants injured plaintiffs' First Amendment interests by denying their applications because of the content of their past artistic expression and by failing to provide a written statement of reasons for the denial.

1. Content-based funding denial

Defendants argue that the denial of plaintiffs' grant applications does not constitute injury to plaintiffs' First Amendment interests because the denial is merely a refusal to subsidize plaintiffs' expressive activities—not a barrier to their exercise. However, it is well-established that

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of

[10] Judgment on the pleadings is proper when the moving party clearly establishes on the face of the complaint, accepting its allegations as true, that it is entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). All inferences reasonably drawn from these facts must be construed in favor of the responding party. *General Conference Corp. of Seventh-Day Adventists*, 887 F.2d at 230.

> speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, [357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). The Supreme Court recently reaffirmed this rule in *Rust v. Sullivan*, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). There the Court stated that the government creates an "unconstitutional condition" when it

> place[s] a condition on the recipient of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

Id. 111 S.Ct. at 1774 (emphasis in original).

Defendants correctly argue that denial of a benefit imposes an unconstitutional condition only when the benefit is conditioned on the recipient's surrender of (or is imposed as a penalty for) constitutionally protected activity *distinct* from that to be funded by the subsidy. *See Rust, id.* (no unconstitutional condition imposed where grant recipients remain free to engage in abortion-related speech with non-grant funds); *compare Perry v. Sindermann*, 408 U.S. at 597, 92 S.Ct. at 2697 (termination of state university employee because he criticized the university's regents constitutes an unconstitutional condition).

However, defendants' contention that the present case does not fall within this proscription is simply wrong.

The amended complaint alleges that plaintiffs applied for funding in a category designed to underwrite performers' professional growth and development, rather than to fund a specific work or project. Thus, the decision not to grant an application in this category cannot be categorized as a refusal to "subsidize" particular speech because the content of the expression generated through the grants cannot be known in advance. In addition, individual plaintiffs' allege that Frohnmayer requested that the Panel reconsider only three of the four applications, because "two of his close friends had attended a Karen Finley show and had reported to him that it was not obscene." This makes clear that plaintiffs complain that their applications were denied based on the content of their past performances, constituting in effect a penalty for past speech. As such, these allegations are sufficient to state a claims under the First Amendment. *Perry*, *id.* at 598, 92 S.Ct. at 2698. Defendants are not entitled to judgment on the pleadings on this claim.

2. Procedural Safeguards

Individual plaintiffs assert that the procedure used to deny their applications violates the First Amendment because defendants failed to set forth in detail and in writing a statement of reasons for the denials.

In support of this claim, plaintiffs cite *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), in which the Court imposed a procedural requirement on the government where the government acts to impose a prior

restraint. The Court there held that the government may impose a prior restraint on a speaker consistent with the First Amendment only if the government initiates and obtains prompt judicial review in which it bears the burden of establishing that the expression is unprotected. *Id.* at 560, 95 S.Ct. at 1247.

Southeastern Promotions does not provide support for the imposition of the procedural requirements requested by plaintiffs in this case. Because it is unsupported by any authority, plaintiffs' claim that defendants failed to provide them with a written statement of reasons for the denials does not state a claim under the First Amendment.

B. *Statutory claims*

In the Third and Fourth claims, individual plaintiffs allege that defendants violated the NEA's governing statutes and the Administrative Procedure Act ("APA") by (1) relying on political criteria not set forth in 20 U.S.C. § 954(c), and (2) by failing to comply with the statutory procedures mandated by 20 U.S.C. § 955. Defendants move to dismiss these claims on the grounds that funding decisions are unreviewable as actions committed to agency discretion, and that the procedure alleged in the amended complaint complies with statutory requirements.

1. Reviewability

The APA provides for judicial review of final agency action. 5 U.S.C. § 704. However, § 704 does not apply where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985). The Supreme Court has held that § 701(a)(2)

> is a very narrow exception. [] The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971) (citation and footnote omitted); *Heckler v. Chaney*, 470 U.S. at 830, 105 S.Ct. at 1655. In other words, "in order for § 701(a)(2) to apply, the matter must be one that a court cannot review even to determine whether the agency, exceeding the scope of its broad power, acted *unlawfully*." *NAACP v. Secretary of Hous. & Urban Dev.*, 817 F.2d 149, 157 (1st Cir. 1987) (emphasis in original).

The version of 20 U.S.C. § 954(c) in effect at the time plaintiffs' applications were denied provided that:

> The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support
>
> (1) projects and productions which have substantial artistic and cultural diversity and the maintenance and encouragement of professional excellence;
>
> (2) projects and productions meeting professional standards or standards of authenticity, irrespective of origin, which are of significant merit and which, without such assistance, would

> otherwise be unavailable to our citizens for geographic or economic reasons;
>
> (3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;
>
> (4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;
>
> (5) projects and productions that will encourage public knowledge, understanding, and appreciation of the arts;
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> (6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;
>
> (7) programs for the arts at the local level; and
>
> (8) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

These criteria are sufficient to constitute "law to apply" in this case. For example, it is clear that the NEA would exceed its statutory authority if it were to allocate funds based solely on financial need or the ethnicity of the applicant, with no regard to the criteria listed in the statute. Thus, although the statute does confer the NEA with discretion to select

grant recipients, that discretion is not boundless. As the limitations of § 954(c) constitute "law to be applied," the § 701(a)(2) exemption for action "committed to agency discretion" is inapplicable. *See NAACP*, 817 F.2d at 158.

The amended complaint alleges that despite the Panel's unanimous recommendation that individual plaintiffs be awarded fellowships as "individuals of exceptional talent," Frohnmayer denied those fellowships for political reasons, *i.e.*, to appease congressional critics. Political expediency is neither an expressed nor implied criterion under the statute for the denial of an NEA grant. Plaintiffs' allegations are sufficient to state a claim under § 954(c) and the APA.

2. *Procedural violation*

Individual plaintiffs also allege that Frohnmayer's poll of individual Council members for their respective recommendations in the Solo Performance Theatre category violated the procedure mandated by the statute.

Under 20 U.S.C. § 955(f), the Chairperson may not award or deny a grant "until the Chairperson has received the recommendation of the Council on such application." In addition, 20 U.S.C. § 955(d) provides that, "The Council shall meet at the call of the Chairperson but not less often than twice during each calendar year. Fourteen members of the Council shall constitute a quorum."[11]

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[11] This section was amended by the 1990 Amendments to add reporting and record-keeping requirements, but the language quoted in the text remains intact. *See* Pub. L. No. 101-512, § 106, 104 Stat. 1968.

Plaintiffs contend that these two provisions, read together, clearly indicate that Congress intended that the Council should act as a collegial body in making recommendations to the Chairperson. In response, defendants argue that the statute contains no requirement "that Council members be collected in a single room or on a single telephone conference call when they convey their recommendation" and insist that this interpretation of the statute is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. *First, always, is the question whether Congress has directly spoken to the precise question at issue.* If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[ ] If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,[ ] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[ ]

Id. at 842-43, 104 S.Ct. at 2781-82 (emphasis added; footnotes omitted).

In this case, congressional intent is clear from the statute itself. First, the use of the words "the

Council" rather than "Council *members* " indicates that Congress intended the Council to act as a body, not an aggregation of individuals, when making recommendations to the Chairperson. Second, the statute provides that the Chairperson may not act on applications until he or she "has received *the* recommendation of the Council." (Emphasis added.) The use of the definite article "the," together with the singular noun "recommendation," indicate an intent that the Council will arrive at a single, collective recommendation. A contrary intent would be expressed with language such as "the recommendations of Council members."

Further, if Congress intended that Council members act individually, and not collegially, in fulfilling their obligation, there would have been no need to establish the quorum requirement of § 955(d). Defendants' construction of the statute renders the quorum requirement superfluous.

Because congressional intent is clear, the court need not (indeed may not) reach the second question of whether the NEA's construction is permissible.

The APA authorizes the court to set aside agency action taken in violation of statutory procedures. 5 U.S.C. § 706(2)(D). Thus, these allegations are sufficient to state a claim upon which relief may be granted.

C. *Privacy Act claim*

Individual plaintiffs also allege that the NEA staff released information to the public from their application files in violation of the Privacy Act, 5 U.S.C. § 552a. Defendants acknowledge that the NEA was the source of these "leaks," but challenge this claim on the grounds that (1) venue is defective as to two

plaintiffs, (2) the Freedom of Information Act ("FOIA") required disclosure of the subject information and therefore immunizes defendants against liability under the Privacy Act, and (3) the information disclosed was already a matter of public record and therefore is not protected by the Privacy Act.

1. Venue

Defendants argue that venue is improper in this district under the Privacy Act's venue provision, 5 U.S.C. § 552a(g)(5), as to two individual plaintiffs, Finley and Hughes, because they do not reside or have their principal places of business in this district. The venue statute provides:

> An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy.

5 U.S.C. § 552a(g)(5).

Relying on cases construing the general venue statute of 28 U.S.C. § 1391(e),[12] applicable to actions in which the United States is a defendant, plaintiffs

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[12] Title 28 U.S.C. § 1391(e) provides in relevant part that a civil action in which a defendant is the United States, or an officer, employee or agency thereof, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

argue that venue is proper in this district as to all plaintiffs because venue is proper as to two of them. *See Exxon Corp. v. FTC*, 588 F.2d 895, 899 (3d Cir. 1978) (venue proper under § 1391(e) where at least one plaintiff resides in the forum district); *National Air Traffic Controllers Ass'n v. Burnley*, 700 F.Supp. 1043, 1045 (N.D. Cal. 1988) (same).

Defendants seek to distinguish these cases by arguing that the general venue statute is broader than the Privacy Act venue provision. While 28 U.S.C. § 1391(e) provides a different set of venue possibilities than is provided in 5 U.S.C. § 552a(g)(5), whether or not the former can be said to be more liberal than the latter misses the point. The reasoning of *Exxon Corp.* is equally applicable to the Privacy Act venue provision: "requiring every plaintiff in an action against the federal government or an agent thereof to independently meet [the statutory venue] standards would result in an unnecessary multiplicity of litigation" and "[t]he language of the statute itself mandates no such narrow construction." *Exxon Corp.*, 588 F.2d at 898- 99.

The court holds that in a multi-plaintiff Privacy Act action, if any plaintiff satisfies the venue requirement of 5 U.S.C. § 552a(g)(5), the venue requirement is satisfied as to the remaining plaintiffs. Because the statutory venue requirement is satisfied as to the Privacy Act claims of two plaintiffs, venue is proper as to all four individual plaintiffs.

2. The FOIA defense

Next, defendants argue that the release of information from individual plaintiffs' files is not actionable under the Privacy Act because release is *required* by FOIA.

The relevant portion of the Privacy Act provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any other person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> * * * * *
>
> (2) required under [FOIA,] section 552 of this title.

5 U.S.C. § 552a(b)(2).[13] FOIA, in turn, contains an internal privacy act of sorts that exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" from its disclosure requirements. 5 U.S.C. § 552(b)(6) (the "(b) (6) exemption").

The Supreme Court has construed the (b)(6) exemption broadly to "cover detailed Government records on an individual which can be identified as applying to that individual." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602, 102 S.Ct. 1957, 1961, 72 L.Ed.2d 358 (1982).

> When disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release

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[13] There is no dispute that NEA is an "agency" subject to this provision, or that the information released constitutes a "record which is contained in a system of records" within the meaning of this section.

of the information would constitute a clearly unwarranted invasion of that person's privacy.

Id. In *Washington Post* the Court held that a newspaper's request for "documents indicating whether [two individuals] . . . hold valid U.S. passports" was information "contained in personnel, medical or similar files" and therefore subject to the balancing test required by the (b)(6) exemption. *Id.* at 596, 598, 102 S.Ct. at 1959, 1960 (emphasis added).[14]

The amended complaint alleges that the NEA released information from individual plaintiffs' application files. Such information clearly "applies to [each of the] particular individual[s]" to which it corresponds, and thus may not be released under FOIA without consideration of the competing interests in personal privacy and public benefit.

3. Publicly available information

Finally, defendants argue that the information released was already publicly available; therefore,

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[14] In support of their position, defendants cite *Kurzon v. Department of Health and Human Serv.*, 649 F.2d 65 (1st Cir. 1981), in which plaintiff sought to compel disclosure under FOIA of the names and addresses of unsuccessful research grant applicants. Reversing summary judgment for defendant, the court rejected defendant's argument that such information was subject to FOIA's exemption for "personnel and medical files and similar files." The court reasoned that the (b)(6) exemption "was intended to shield against a variety of embarrassing disclosures . . . 'of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records.'" *Id.* at 68, *quoting Board of Trade v. CFTC*, 627 F.2d 392, 398 (D.C.Cir.1980). However, in *Washington Post* the Supreme Court explicitly rejected *Board of Trade*, the case on which *Kurzon* relied. *See Washington Post*, 456 U.S. at 598, 102 S.Ct. at 1959.

that disclosure cannot violate the Privacy Act. *See King v. Califano*, 471 F. Supp. 180, 181 (D.D.C. 1979) (officials who informed press that an Administrative Law Judge was removed due to severe mental and emotional problems did not "disclose" the information within the meaning of the privacy act because that information was "publicly known prior to . . . publication"). However, case law in this Circuit is contra. *See Covert v. Herrington*, 667 F.Supp. 730, 739 (E.D. Wash. 1987) (information obtained from public sources and then released to an outside agency constitutes "disclosure" within the meaning of the Privacy Act), *aff'd*, 876 F.2d 751 (9th Cir. 1989); *see also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753, 780, 109 S.Ct. 1468, 1471, 1485, 103 L.Ed.2d 774 (1989) (recognizing a categorical exemption under FOIA for private citizen "rap sheets," although the data are compiled from publicly available documents).

Thus, even if it were clear from the face of the amended complaint that the information released was already a matter of public record, in this Circuit, the allegations state a claim for relief under the Privacy Act.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

All plaintiffs move for summary judgment on the Sixth Claim, which alleges that the "decency clause" is impermissibly vague under the Fifth Amendment Due Process Clause and violates the First Amendment on its face. In opposition, defendants argue that (1) all plaintiffs lack standing to challenge this provision; (2) the vagueness challenge fails on the merits because the NEA has implemented a limiting con-

struction of the clause that cures any ambiguity; and (3) as construed by the agency, the provision does not injure any artist's First Amendment interests.

A. *Standing*

Defendants first argue that plaintiffs do not have standing to challenge § 954(d) because (1) allegations of "chill alone" cannot support standing and (2) plaintiffs cannot demonstrate any threatened or actual injury from the challenged provision.

To establish standing, a plaintiff must show that (1) "he personally has suffered some actual or threatened injury" as a result of defendants' actions; (2) the injury "fairly can be traced to the challenged action"; and (3) the injury is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

Citing *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972), defendants contend that plaintiffs' allegation of a "chilling effect" is insufficient to establish the required "actual or threatened injury" under the *Valley Forge* test. In *Laird*, a group of citizens sued to enjoin an Army program that gathered and stored information about protest marches and demonstrations. The Court found that *Laird* plaintiffs lacked standing because they had simply read about the Army program in the newspaper and could not explain "the precise connection between the mere existence of the challenged system and their alleged chill." *Id.* at 13 n. 7, 92 S.Ct. at 2325 n. 7.

Individual plaintiffs argue that *Laird* is factually distinguishable because all individual plaintiffs here

have, in the past, been denied grants based on the controversial content of their expression. Also, individual plaintiffs Hughes and Miller applied for and were awarded NEA grants in 1991 under the new standard. Hughes claims that, as a result of the "decency" standard, she believed it necessary to defend her work against charges of indecency and addressed this issue in her funding application rather than elaborating on her work and its goals. Both Hughes and Miller claim that the existence of the "decency" provision circumscribes their artistic freedom because they fear stepping across an invisible line of "decency" which would result in forfeiture of some or all of their 1991 grants and disqualification for future grants.[15]

Plaintiffs contend that these facts are analogous to those presented in *Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 95 S.Ct. 425, 42 L.Ed.2d

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[15] Applicants are required as part of the application process to submit an assurance that their projects or productions "will meet the standards of artistic excellence and artistic merit required by this subchapter." 20 U.S.C. § 954(i)(4). That standard now includes a consideration of "general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1). In addition, recipients are required to file an interim report that includes a description of her or his compliance with "the subchapter" (which includes the "decency" standard). 20 U.S.C. § 954(i)(3)(A)(ii).

Grant funds are distributed in installments, and payments may be suspended if the Chairperson determines that the recipient is not in compliance with § 954 or any other conditions of the grant. 20 U.S.C. § 954(j). In addition, failure to satisfy the purposes for which the assistance was provided may be taken into account in determining whether to provide any subsequent financial assistance. 20 U.S.C. § 959(f)(3)(A).

627 (Marshall, Circuit Justice, 1974). There, Justice Marshall refused to stay the reversal of an injunction barring the government from conducting surveillance at a youth organization conference. He first found that the plaintiffs had standing to maintain the action. Distinguishing *Laird*, he held:

> In this case, the allegations are much more specific: the applicants have complained that the challenged investigative activity will have the concrete effects of dissuading some YSA delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. Whether the claimed "chill" is substantial or not is still subject to question. The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Article III.

Id. at 1319, 95 S.Ct. at 428.

At a minimum, plaintiffs Hughes and Miller, who have applied for and received funding under the new statute, have standing because they risk forfeiting their grants if they engage in behavior determined by the NEA to be in contravention of the decency provision. These plaintiffs face threatened and actual harm because, in order to retain their grants and to ensure that they are considered for future grants, they must now restrict their expressive conduct, which is otherwise protected by the First Amendment.

The standing of individual plaintiffs Finley and Fleck, who did not apply for grants, is less clear because they allege only that they have forgone their application opportunity out of "fear" that they would

be denied funding. However, as Hughes and Miller have met the "injury" prong, it is unnecessary to the resolution of the substantive claim that the court determine the standing of the remaining individual plaintiffs. *See Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 562 n. 9, 50 L.Ed.2d 450 (1977).

In addition, the NAAO has standing both on its own behalf and as a representative of its members who have applied for grants. First, NAAO's expenditure of resources to advocate against the decency standard and to assist its members in responding to the standard creates a cognizable injury to that organization. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982) (alleging injury to organization's activities and consequent drain on its resources satisfies injury requirement for organization to assert standing in its own right); *see also El Rescate Legal Serv., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992) (accord); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir.) ("organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action"), *cert. denied*, 498 U.S. 980, 111 S.Ct. 508, 112 L.Ed.2d 521 (1990).

Moreover, NAAO satisfies the requirements for representative standing based on injury to its members. First, the Director of the NAAO reports that, like Hughes and Miller, some members have received NEA grants under the new standards, but are "chilled" in the scope of their work and their applications by uncertainty as to how to comply with the decency clause. Second, this suit seeks to protect

freedom of artistic expression, an interest germane to NAAO's organizational purpose. Lastly, neither this claim nor the requested relief requires the individual participation of NAAO members. *See International Union, UAW v. Brock*, 477 U.S. 274, 282, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986) (listing requirements for representative organizational standing).

B. *Statutory Construction*

Because the court must avoid deciding a constitutional issue if possible, it is first necessary to determine whether § 954(d)(1), as amended, can be construed to avoid conflict with constitutional proscriptions.

Defendants advance two possible constructions of the statute which they contend avoid constitutional infirmity. Defendants contend (1) that the decency provision does "not impose content restrictions on NEA grant decisions," but "merely implements a method for selecting review panel members" and, alternatively, (2) that "decency" and "respect . . . are factors only to the extent that they are implicit in the assessment of artistic merit."

Again, under *Chevron*, the initial question is whether congressional intent on the issue is clear. Section 954(d), as amended in 1990, provides that

> artistic excellence and artistic merit are the criteria by which applications are judged, *taking into consideration* general standards of decency and respect for the diverse beliefs and values of the American public.

20 U.S.C. § 954(d)(1) (emphasis added). The plain language of the statute requires that "general standards of decency and respect for the diverse beliefs and

values of the American public" be "tak[en] into consideration" in judging applications.[16]

Thus, it is clear from the language of the statute that "decency" and "respect" for diverse beliefs *are* factors to be considered in determining "artistic merit," and therefore eligibility for funding.

Even had the statute itself not been clear, neither of defendants' constructions is entitled to deference because both are "manifestly contrary to congressional intent." *See Chevron*, 467 U.S. at 844, 104 S.Ct. at 2782; *Railway Labor Executives' Ass'n v. ICC*, 958 F.2d 252, 256 (9th Cir. 1992) (where congressional intent is ambiguous, the agency's construction controls "unless it is 'arbitrary, capricious or manifestly contrary to the statute'").

First, a construction that this clause "merely implements a method for selecting review panel members" cannot be given effect for it would render 20 U.S.C. § 959(c), as amended by the same act that added the "decency" provision, superfluous.[17] *See Freytag*

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[16] In addition to this plain language, the plethora of comments in the Congressional Record indicates that the "decency" provision was intended to act as a bar to funding controversial projects or artists. *See, e.g.*, 136 Cong. Rec. H9410-57 (daily ed. Oct. 11, 1990) (statements by members of Congress explaining that the "decency" provision would preclude funding of works such as Andres Serrano's "Piss Christ" and others that would "deeply offend the sensibilities of significant portions of the public").

[17] 20 U.S.C. § 959(c) now reads in relevant part:

> The Chairperson of the National Endowment for the Arts shall utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts . . . When reviewing applications, such panels shall recommend applications for projects, productions, and workshops solely on the basis of artistic excellence and

v. Commissioner, 501 U.S. 868, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment'"). Because § 959(c) requires that the composition of Peer Review Panels reflect "wide geographic, ethnic, and minority representation as well as . . . diverse artistic and cultural points of view," a construction of the decency provision as requiring only the diversification of panel membership would render the "decency" clause of § 954(d) without legal content.

Second, defendants' alternative construction (*i.e.*, that "decency" and "respect" are factors only to the extent that they are implicit in the assessment of artistic merit) is also manifestly contrary to congressional intent. It defies logic to argue that explicit additions to the "artistic merit" standard are merely implicit in the assessment of artistic merit. Had Congress believed that "decency" and "respect for diverse views" were naturally embedded in the concept of "artistic merit," there would be no need to elaborate on that standard.

C. *Vagueness*

The Fifth Amendment due process clause requires that a statute be sufficiently clearly defined so as not to cause persons "of common intelligence—necessarily [to] guess at its meaning and [to] differ as

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artistic merit. The Chairperson shall issue regulations and establish procedures—

(1) *to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view.*

to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). In the area of expressive conduct, vague laws offend several important values: (1) they may trap the innocent by failure to provide fair warning; (2) they may fail to provide explicit and objective standards and therefore permit arbitrary and discriminatory enforcement; and (3) they may inhibit First Amendment freedoms by forcing individuals to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108- 09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (internal quotation marks omitted); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-13 (9th Cir. 1988).

Plaintiffs and amici argue, at length, that the decency provision is vague and should be refused effect under both the First and Fifth Amendments. Citing a number of Supreme Court opinions, they contend that words such as "decency" and "respect" are inherently subjective. *See Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974) ("what is contemptuous to one [person] may be a work of art to another"); *Cohen v. California*, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) ("one [person]'s vulgarity is another's lyric"). In addition, they point out that such words as "decency" and "respect" are contentless in the context of American society: the very nature of our pluralistic society is that there are an infinite number of values and beliefs, and correlatively, there may be no national "general standards of decency." *See also Bullfrog Films v. Wick*, 646 F.Supp. 492, 505 (C.D. Cal. 1986) (finding USIA regulation impermissibly vague because "[h]ow is one to determine what is 'misrepresentative' of an

open, diverse and pluralistic society as is the United States"), *aff'd*, 847 F.2d 502 (9th Cir. 1988).

There is no question that persons "of common intelligence must necessarily guess at [the] meaning and differ as to [the] application" of § 954(d). *Connally*, 269 U.S. at 390, 46 S.Ct. at 127. Further, this provision clearly gives rise to each of the three evils identified in *Grayned*: (1) it creates a trap for the unwary applicant who may engage in expression she or he believes to comport with the standard, only to learn upon receiving notice that her or his grant has been withdrawn or a new application denied because she or he has offended someone's subjective understanding of the standard; (2) panelists, the Council, and the Chairperson are given no guidance in administering the standard; each apparently is expected to draw on her or his own personal views of decency or some ephemeral "general American standard of decency;" and (3) it necessarily causes the imposition of self-censorship wider than the line drawn by the statute because the line is, in effect, imperceptible. *See* 408 U.S. at 108-09, 92 S.Ct. at 2299.

As the decency provision fails adequately to notify applicants of what is required of them or to circumscribe NEA discretion, it cannot be given effect consistent with the Fifth Amendment's due process requirement.

D. *First Amendment*

Plaintiffs also contend that the "decency" clause violates the First Amendment on two grounds. First, they contend that the decency clause constitutes an unconstitutional condition. They argue that because the NEA reviews all of an applicant's prior work in determining whether the application meets that stan-

dard. Alternatively, plaintiffs contend that, even if the reach of the decency clause is limited to work funded by the NEA, public funding of the arts (like public funding in the context of a university or the press) requires government neutrality, a requirement violated by the decency clause.

The unconstitutional condition theory is easily disposed of for two reasons. First, this theory rests on allegations that NEA appraisal of funding applications includes an evaluation of each applicant's entire body of work—whether NEA-funded or otherwise. However, this is a facial challenge to the statute. On such a challenge, it is inappropriate to consider the manner in which the agency has interpreted and applied the statute.

Second, in support of this claim, plaintiffs have submitted evidence that the NEA grant-making process includes review of non-NEA funded works in more than one category within the NEA's Theater Program. In response, defendants have adduced evidence that an applicant's past work is considered only in a few limited categories, and even then review is confined to consideration of the titles and dates of the performances. As defendants' evidence creates a material factual dispute, resolution of this issue on summary judgment would be foreclosed even if agency practice were a permissible consideration in this context.[18]

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[18] An argument can be made that the decency clause constitutes a facially unconstitutional condition with respect to groups, agencies and non-profit organizations that receive NEA funding. Because the NEA is permitted to fund only up to 50% of the total cost of any program or project conducted by a group, agency or non-profit organization, 20 U.S.C. § 954(e) (groups), § 954(p)(3) (agencies and non-profit organizations),

1. First Amendment interest in artistic expression funded by the government

As an alternative theory of First Amendment violation, plaintiffs contend that public subsidization of art, like public funding of the press and university activities, demands government neutrality. In effect, plaintiffs ask the court to recognize a protected First Amendment interest in artistic expression funded by the government.

Plaintiffs point out that the Court in *Rust v. Sullivan* cautioned that "funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is [not] invariably sufficient to justify government control over the content of expression." 111 S.Ct. at 1776. The Court cited universities and public fora as two settings in which First Amendment values demand government neutrality notwithstanding that in both contexts the government is merely declining to support speech rather than prohibiting it altogether. *Id.* The Court observed that its prior decisions recognized that

> the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of funds is

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any statutory content control over an NEA-supported program or project necessarily imposes restrictions over a substantial proportion of non-NEA-funded expression. However, as the NAAO have not raised this argument, the court does not address or resolve it.

> restricted by the vagueness and overbreadth doctrines of the First Amendment.

Id. (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967)).[19]

In *Keyishian*, a case widely-cited in support of academic freedom, the Court observed that

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The Nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Keyishian, 385 U.S. at 603, 87 S.Ct. at 683.

Artistic expression, no less than academic speech or journalism, is at the core of a democratic society's cultural and political vitality. Congress recognized as much in establishing the NEA. For example, the Senate Report accompanying the NEA's creation devoted an entire section to "Freedom of Expression." It stated, *inter alia*, that:

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[19] In addition, other recent cases suggest that the press is also an arena in which content controls on subsidies are prohibited. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 1443-46, 113 L.Ed.2d 494 (1991) (content-based subsidization of the press through tax exemptions constitutes First Amendment injury); *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209 (1987) (tax exemption based on content of a publication constitutes First Amendment injury).

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the *committee affirms that the intent of this act should be the encouragement of free inquiry and expression.* The committee wishes to make clear that conformity for its own sake is not to be encouraged, and that no undue preference should be given to any particular style or school of thought or expression . . . The standard should be artistic and humanistic excellence.

S.Rep. No. 300, 89th Cong. 1st Sess. 3-4 (1965) (emphasis added).

In addition, the significance of the arts as a "traditional sphere of free expression . . . fundamental to the functioning of our society," *Rust*, 111 S.Ct. at 1776, is confirmed by the legislative "Declaration of findings and purposes" that is a part of the NEA's authorizing statute. There, Congress stated, in part, that:

> (3) An advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.

> (4) Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located the masters of their technology and not its unthinking servants.
>
> (6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.
>
> (7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.
>
> (9) Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of excellence that comprises our cultural heritage, and artistic and scholarly expression.
>
> (10) It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.

20 U.S.C. § 951.

It is clear from these legislative findings[20] that artistic expression serves many of the same values central to a democratic society and underlying the First Amendment as does scholarly expression in other fields. In addition, as reported by *amicus curiae* College Art Association ("CAA"),[21] NEA grants are often made to artists and museums in the university context. For example, the CAA itself has received NEA grants to support its annual conference in past years. Additionally, many of its individual and institutional members have received NEA grants. CAA reports that government support has been critical to the health and well-being of the arts and humanities in American universities.

The close relationship between academic freedom and artistic expression was recently set forth in a statement by participants in a conference sponsored by the American Association of University Professors, the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the Wolf Trap Foundation:

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[20] These findings were reaffirmed by Congress through the revision and republication of this section as part of the 1990 Amendments. *See* Pub. L. No. 101-512, § 101, 104 Stats. 1961-62.

[21] The College Art Association is a nationwide, non-profit organization whose members include 2,000 institutions of higher education and museums, in addition to 11,600 individual artists, art historians and museum professionals. It was founded in 1911 both as a learned society and professional organization dedicated to promoting the highest standards of scholarship and teaching in the history and criticism of the visual arts and to foster the highest levels of technical skill in teaching and practices of art.

> We believe that "essential as freedom is for the relation and judgment of facts, it is even more indispensable to the imagination." . . . Faculty and students engaged in the creation and presentation of works of the visual and the performing arts are engaged in pursuing the mission of the university as much as are those who write, teach, and study in other academic disciplines. Works of the visual and performing arts are important both in their own right and because they can enhance our experience and understanding of social institutions and the human condition. Artistic expression in the classroom, studio and workshop therefore merits the same assurance of academic freedom that is accorded to other scholarly and teaching activities.

Academic Freedom and Artistic Expression, Academe at 13 (July-Aug. 1990).

In response to plaintiffs' position, defendants note that unlike public fora, NEA funding is a limited resource, and argue that the NEA cannot parcel out its limited budget on a purely content-neutral, first-come-first- served basis as governments must do in allocating use of a public forum. Instead, they argue, the agency must select a small percentage of the many applicants based on its subjective judgment of which of the exceptionally talented artists would best promote the statute's objectives.

Defendants misapprehend the substance of plaintiffs' challenge. Plaintiffs do not argue that arts funding is analogous to a public forum or that NEA funds must be allocated on a first-come, first-served basis. Rather, plaintiffs analogize funding for the arts to funding of public universities. In both set-

tings, limited public funds are allocated to support expressive activities, and some content-based decisions are unavoidable. Nonetheless, this fact does not permit the government to impose whatever restrictions it pleases on speech in a public university, nor should it provide such license in the arts funding context. Hiring and promotion decisions based on professional evaluations of academic merit are permissible in a public university setting, but decisions based on vague criteria or intended to suppress unpopular expression are not. *See Dube v. State Univ. of New York*, 900 F.2d 587, 598 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211, 111 S.Ct. 2814, 115 L.Ed.2d 986 (1991); *Levin v. Harleston*, 770 F.Supp. 895, 921 (S.D.N.Y. 1991); *cf. Keyishian*, 385 U.S. at 605-606, 87 S.Ct. at 685. Analogously, professional evaluations of artistic merit are permissible, but decisions based on the wholly subjective criterion of "decency" are not. *Cf. Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575-77 (9th Cir. 1984) (city may dedicate public forum to certain categories of expression but may not deny access to performers based on their political views or unorthodox manner of expression), *cert. denied*, 471 U.S. 1054, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985).

Thus, the fact that the exercise of professional judgment is inescapable in arts funding does not mean that the government has free rein to impose whatever content restrictions it chooses, just as the fact that academic judgment is inescapable in the university does not free public universities of First Amendment scrutiny. The right of artists to challenge conventional wisdom and values is a cornerstone of artistic and academic freedom, no less than the rights of scientists funded by the National Institutes of Health.

See Board of Trustees of Leland Stanford Jr. Univ. v. Sullivan, 773 F.Supp. 472, 478 (D.D.C. 1991). Therefore, the court holds that government funding of the arts is subject to the constraints of the First Amendment.

2. First Amendment injury

Having concluded that public funding of art is entitled to First Amendment protection, the resolution of plaintiffs' challenge is straightforward.

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). A statute that suppresses a substantial amount of constitutionally protected expression must be refused effect unless it is subject to a construction that narrows its reach only to unprotected speech. *See Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575-76, 107 S.Ct. 2568, 2573, 96 L.Ed.2d 500 (1987).

The decency clause seeks to suppress speech that is offensive to some in society. It is well-established that

> the fact that given speech is thought by many to be highly offensive, either because it espouses political, religious, racial or other doctrines which to many are most abhorrent, [] or because of its use of "indecent" words,[] does not, absent a

> showing of likely and imminent antisocial conduct arising from such speech, constitute a ground for abridging speech.

M.B. Nimmer, *Nimmer on Freedom of Speech* § 2.05[B][1] at 2-30 (1991) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)).

The decency clause clearly reaches a substantial amount of protected speech. In *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989), the Supreme Court held that "expression which is indecent but not obscene is protected by the First Amendment. . . ." *See also FCC v. Pacifica Found.*, 438 U.S. 726, 740, 98 S.Ct. 3026, 3035, 57 L.Ed.2d 1073 (1978) ("prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality"). The statute seeks to confine the NEA's funding approval only to what is "decent." Conversely, it seeks to dissuade the NEA from funding what is "indecent" When a statute directed at speech is overbroad, as is the decency clause, it gives rise to the hazard that "a substantial loss or impairment of freedoms of expression will occur. . . ." *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965).

The decency clause sweeps within its ambit speech and artistic expression which is protected by the First Amendment. The court, therefore, holds that the decency clause, on its face, violates the First Amendment for overbreadth and cannot be given effect.

CONCLUSION

For all of the foregoing reasons, the court denies defendants' motion for judgment on the pleadings, except with respect to plaintiffs' Second Claim. Further, the court grants plaintiffs' motion for summary judgment on the Sixth Claim, on the grounds that the "decency" clause of 20 U.S.C. § 954(d)(1), on its face, is void for vagueness under the Fifth Amendment and is overbroad under the First Amendment. A separate judgment shall be entered on the Sixth Claim, consistent herewith.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-56028

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES;
TIM MILLER; NATIONAL ASSOCIATION OF
ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA
RADICE,* IN HER OFFICIAL CAPACITY
AS CHAIRPERSON OF THE NATIONAL ENDOWMENT
FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-56387

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES;
TIM MILLER; NATIONAL ASSOCIATION OF
ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA
RADICE, IN HER OFFICIAL CAPACITY
AS CHAIRPERSON OF THE NATIONAL ENDOWMENT
FOR THE ARTS, DEFENDANTS-APPELLANTS

No. 92-55089

KAREN FINLEY; JOHN FLECK; HOLLY HUGHES;
TIM MILLER; NATIONAL ASSOCIATION OF
ARTISTS' ORGANIZATIONS, PLAINTIFFS-APPELLEES

v.

NATIONAL ENDOWMENT FOR THE ARTS; ANNE-IMELDA
RADICE, IN HER OFFICIAL CAPACITY
AS CHAIRPERSON OF THE NATIONAL ENDOWMENT
FOR THE ARTS, DEFENDANTS-APPELLANTS

May 1, 1997

ORDER

Before: BROWNING, FERGUSON, and KLEINFELD, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

O'SCANNLAIN, Circuit Judge, joined by KOZINSKI and KLEINFELD, Circuit Judges,- dissenting from order rejecting suggestion for rehearing en banc:

This case should be reheard en banc because our three judge panel split decision conflicts with two other circuits, is wrong on the merits, and turns the First Amendment on its head.

The plaintiffs are artists, who, along with 5,164 others, applied for a Visual Arts Fellowship from the National Endowment for the Arts ("NEA") in 1994. The plaintiffs weren't awarded fellowships (although 88 others were) so they sued, claiming that their First Amendment rights had been violated because Congress required the NEA, in addition to judging applications by "artistic excellence" and "artistic merit," to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d). In ruling that the "decency and respect" provision offends the First Amendment, our divided court commits three grave errors.

First, the panel majority gave the NEA statute an implausible construction. According to the panel, rather than merely take "decency and respect" into consideration, as the statute says, the NEA must use "decency and respect" as the decisive criterion for awarding grants. *Finley v. NEA*, 100 F.3d 671, 680 (9th Cir.1996). There simply is no warrant for manufacturing such an imagined conflict with the First Amendment.[1]

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[1] The panel creates more than an imagined conflict with two of our sister circuits. See *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir.1985); *Advocates for the Arts v. Thomson*, 532 F.2d 792 (1st Cir.). *cert. denied*, 429 U.S. 894, 97 S.Ct. 254, 50 L.Ed.2d 177 (1976).

The panel's second error aggravates the first by applying the "void for vagueness" doctrine where it does not belong, and without regard for the purposes underlying it. A vague law is not as dangerous when the government is handing out a prize instead of meting out a punishment. The "decency and respect" provision neither "trap[s] the innocent," nor "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108- 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

As the panel majority would have it, however, simply because the statute is vague and has something to do with speech, it must offend the First Amendment. See *Finley*, 100 F.3d at 679. In my view, this is wrong: a law must actually threaten or chill protected speech before we strike it down.

How does the "decency and respect" provision inhibit First Amendment rights? Tellingly, the majority doesn't say. It merely points to the heightened need for specific standards when a statute's provisions "touch upon speech." *Finley*, 100 F.3d at 679. The need "may be even greater when a statute subsidizes speech and the risk that the provision on its face will inhibit speech remains." *Id.* This confusing (and doubtful) statement utterly fails to explain how First Amendment liberties are threatened when the government awards a prize.

The majority might well have thought that a government award for certain types of art will subtly coerce artists to produce art of that type, thereby

chilling creation of "other" art. Or it could have thought that artists cannot be denied a government benefit because they express themselves in a particular way, *i.e.*, indecently. Neither theory fits here, however.

If the first argument were true, the government could never hand out awards for any specific type of art without chilling other artistic expression. Under such reasoning, it would be unconstitutional for the government to award a prize for the best performance of Mozart's "Magic Flute" because it might coerce opera companies across the nation to perform that opera in preference to another.

The second argument is equally problematic. The Supreme Court has repeatedly instructed that the First Amendment is not violated when Congress subsidizes some speech, but not all speech. *Rust v. Sullivan*, 500 U.S. 173, 193, 111 S.Ct. 1759, 1772, 114 L.Ed.2d 233 (1991); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549, 103 S.Ct. 1997, 2002-03, 76 L.Ed.2d 129 (1983); *Harris v. McRae*, 448 U.S. 297, 317 n. 19, 100 S.Ct. 2671, 2688 n. 19, 65 L.Ed.2d 784 (1980); *Maher v. Roe*, 432 U.S. 464, 475, 97 S.Ct. 2376, 2383, 53 L.Ed.2d 484 (1977); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Moreover, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), cannot be stretched to cover this case: the government benefit here is given out to a select few artists on the basis of the content of their expression. Rosenberger should not be read to apply to prizes.

The panel's third error comes in its alternate holding: that the statute is impermissible because it contains content-based and viewpoint-based restrictions. The panel applies standard First Amendment principles to a situation that the First Amendment doesn't cover. When the government awards a special prize to a select few artists, it necessarily will distinguish between the artists on the basis of the content of their speech. Indeed, content-based distinctions are the whole reason for NEA grants. Considerations of viewpoint are also a necessary element of the decision of whether art is "excellent" or meritorious. What art critic would contend that the subject matter of a work of art is irrelevant to deciding whether it is "excellent"? In any event, the terms "artistic excellence" and "artistic merit" are vague enough to allow an NEA official to consider an artist's viewpoint, but that doesn't bother the majority. It shouldn't, because the First Amendment does not prohibit that. Neither does the Amendment prohibit "taking into consideration general standards of decency and respect" when awarding a prize.

The majority's opinion does far more than give a hostile construction to a Congressional enactment in order to create a conflict with other circuits and Supreme Court precedent, and overturn a law. It sows the seeds of an imprudent First Amendment jurisprudence which will entangle and choke Congress' ability to control public funds used to sponsor any sort of free expression.

Because this case should have been reheard en banc, I respectfully dissent from the court's order not to do so.

APPENDIX D

STATUTES INVOLVED

UNITED STATES CODE
TITLE 20—EDUCATION
CHAPTER 26—SUPPORT AND SCHOLARSHIP IN HUMANITIES AND ARTS; MUSEUM SERVICES
SUBCHAPTER I—NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

§ 951. Declaration of findings and purposes

The Congress finds and declares the following:

(1) The arts and the humanities belong to all the people of the United States.

(2) The encouragement and support of national progress and scholarship in the humanities and the arts, while primarily a matter for private and local initiative, are also appropriate matters of concern to the Federal Government.

(3) An advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.

(4) Democracy demands wisdom and vision in its citizens. It must therefore foster and support a form of education, and access to the arts and the humanities, designed to make people of all backgrounds and wherever located masters of their technology and not its unthinking servants.

(5) It is necessary and appropriate for the Federal Government to complement, assist, and add to programs for the advancement of the

humanities and the arts by local, State, regional, and private agencies and their organizations. In doing so, the Government must be sensitive to the nature of public sponsorship. Public funding of the arts and humanities is subject to the conditions that traditionally govern the use of public money. Such funding should contribute to public support and confidence in the use of taxpayer funds. Public funds provided by the Federal Government must ultimately serve public purposes the Congress defines.

(6) The arts and the humanities reflect the high place accorded by the American people to the nation's rich cultural heritage and to the fostering of mutual respect for the diverse beliefs and values of all persons and groups.

(7) The practice of art and the study of the humanities require constant dedication and devotion. While no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent.

(8) The world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and of the spirit.

(9) Americans should receive in school, background and preparation in the arts and humanities to enable them to recognize and appreciate the aesthetic dimensions of our lives, the diversity of

excellence that comprises our cultural heritage, and artistic and scholarly expression.

(10) It is vital to a democracy to honor and preserve its multicultural artistic heritage as well as support new ideas, and therefore it is essential to provide financial assistance to its artists and the organizations that support their work.

(11) To fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people, the Federal Government must transmit the achievement and values of civilization from the past via the present to the future, and make widely available the greatest achievements of art.

(12) In order to implement these findings and purposes, it is desirable to establish a National Foundation on the Arts and the Humanities.

§ 952. Definitions

As used in this chapter—

* * * * *

(b) The term "the arts" includes, but is not limited to, music (instrumental and vocal), dance, drama, folk art, creative writing, architecture and allied fields, painting, sculpture, photography, graphic and craft arts, industrial design, costume and fashion design, motion pictures, television, radio, film, video, tape and sound recording, the arts related to the presentation, performance, execution, and exhibition of such major art forms, all those traditional arts practiced by the diverse peoples of this country, and the study and application of the arts to the human environment.

(c) The term "production" means plays (with or without music), ballet, dance and choral performances, concerts, recitals, operas, exhibitions, readings, motion pictures, television, radio, film, video, and tape and sound recordings, and any other activities involving the execution or rendition of the arts and meeting such standards as may be approved by the National Endowment for the Arts established by section 954 of this title.

(d) The term "project" means programs organized to carry out the purposes of this subchapter, including programs to foster American artistic creativity, to commission works of art, to create opportunities for individuals to develop artistic talents when carried on as a part of a program otherwise included in this definition, and to develop and enhance the widest public knowledge and understanding of the arts, and includes, where appropriate, rental or purchase of facilities, purchase or rental of land, and acquisition of equipment. * * * * *

(e) The term "group" includes any State or other public agency, and any nonprofit society, institution, organization, association, museum, or establishment in the United States, whether or not incorporated.

(f) The term "workshop" means an activity the primary purpose of which is to encourage the artistic development or enjoyment of amateur, student, or other nonprofessional participants, or to promote scholarship and teaching among the participants.

* * * * *

§ 953. National Foundation on the Arts and the Humanities

(a) Establishment; composition

There is established a National Foundation on the Arts and the Humanities (hereinafter referred to as the "Foundation"), which shall be composed of a National Endowment for the Arts, a National Endowment for the Humanities, a Federal Council on the Arts and the Humanities, and an Institute of Museum Services.

(b) Purpose

The purpose of the Foundation shall be to develop and promote a broadly conceived national policy of support for the humanities and the arts in the United States, and for institutions which preserve the cultural heritage of the United States pursuant to this subchapter.

* * * * *

§ 954. National Endowment for the Arts

(a) Establishment

There is established within the Foundation a National Endowment for the Arts.

(b) Chairperson of the Endowment; term of office; vacancies

(1) The Endowment shall be headed by a chairperson, to be known as the Chairperson of the National Endowment for the Arts, who shall be appointed by the President, by and with the advice and consent of the Senate.

* * * * *

(c) Program of contracts, grants-in-aid, or loans to groups and individuals for projects and productions; traditionally underrepresented recipients of financial assistance

The Chairperson, with the advice of the National Council on the Arts, is authorized to establish and carry out a program of contracts with, or grants-in-aid or loans to, groups or, in appropriate cases, individuals of exceptional talent engaged in or concerned with the arts, for the purpose of enabling them to provide or support—

(1) projects and productions which have substantial national or international artistic and cultural significance, giving emphasis to American creativity and cultural diversity and to the maintenance and encouragement of professional excellence;

(2) projects and productions, meeting professional standards or standards of authenticity or tradition, irrespective of origin, which are of significant merit and which, without such assistance, would otherwise be unavailable to our citizens for geographic or economic reasons;

(3) projects and productions that will encourage and assist artists and enable them to achieve wider distribution of their works, to work in residence at an educational or cultural institution, or to achieve standards of professional excellence;

(4) projects and productions which have substantial artistic and cultural significance and that reach, or reflect the culture of, a minority, inner city, rural, or tribal community;

(5) projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts;

(6) workshops that will encourage and develop the appreciation and enjoyment of the arts by our citizens;

(7) programs for the arts at the local level;

(8) projects that enhance managerial and organizational skills and capabilities;

(9) projects, productions, and workshops of the kinds described in paragraphs (1) through (8) through film, radio, video, and similar media, for the purpose of broadening public access to the arts; and

(10) other relevant projects, including surveys, research, planning, and publications relating to the purposes of this subsection.

* * * * *

In selecting individuals and groups of exceptional talent as recipients of financial assistance to be provided under this subsection, the Chairperson shall give particular regard to artists and artistic groups that have traditionally been underrepresented.

(d) Application for payment; regulations and procedures

No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that—

(1) artistic excellence and artistic merit are the criteria by which applications are judged,

taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and

(2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded. Projects, productions, workshops, and programs that are determined to be obscene are prohibited from receiving financial assistance under this subchapter from the National Endowment for the Arts.

The disapproval or approval of an application by the Chairperson shall not be construed to mean, and shall not be considered as evidence that, the project, production, workshop, or program for which the applicant requested financial assistance is or is not obscene.

* * * * *

§ 959. Administrative provisions

(a) General authority of Chairpersons

In addition to any authorities vested in them by other provisions of this subchapter, the Chairperson of the National Endowment for the Arts and the Chairperson of the National Endowment for the Humanities, in carrying out their respective functions, shall each have authority—

(1) to prescribe such regulations as the Chairperson deems necessary governing the manner in which the Chairperson's functions shall be carried out;

* * * * *

(4) to utilize experts and consultants, including panels of experts, who may be employed as authorized by section 3109 of title 5;

* * * * *

(c) Advisory panels; membership; procedures

The Chairperson of the National Endowment for the Arts shall utilize advisory panels to review applications, and to make recommendations to the National Council on the Arts in all cases except cases in which the Chairperson exercises authority delegated under section 955(f) of this title. When reviewing applications, such panels shall recommend applications for projects, productions, and workshops solely on the basis of artistic excellence and artistic merit. The Chairperson shall issue regulations and establish procedures—

(1) to ensure that all panels are composed, to the extent practicable, of individuals reflecting a wide geographic, ethnic, and minority representation as well as individuals reflecting diverse artistic and cultural points of view;

(2) to ensure that all panels include representation of lay individuals who are knowledgeable about the arts but who are not engaged in the arts as a profession and are not members of either artists' organizations or arts organizations;

(3) to ensure that, when feasible, the procedures used by panels to carry out their responsibilities are standardized;

(4) to require panels—

(A) to create written records summarizing—

(i) all meetings and discussions of such panel; and

(ii) the recommendations made by such panel to the Council; and

(B) to make such records available to the public in a manner that protects the privacy of individual applicants and panel members;

(5) to require, when necessary and feasible, the use of site visitations to view the work of the applicant and deliver a written report on the work being reviewed, in order to assist panelists in making their recommendations; and

(6) to require that the membership of each panel change substantially from year to year and to provide that each individual is ineligible to serve on a panel for more than 3 consecutive years.

* * * * *